SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 419

GLOBE INDEMNITY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA TO THE USE OF STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

1928.

Oct. 17th. Præcipe to issue summons filed.
17th. Summons Exit Returnable 1st Monday in November, 1928.
17th. Statement of Claim filed.
17th. Notice to file affidavit of defense filed.
24th. Petition for and order of court directing service of notice of suit filed.
27th. Subpœna returned; "Sanitation Corporation not found, on Oct. 22nd served A. B. Bielaski, Receiver, and Globe Indemnity Company", and filed.
31st. Præcipe to issue alias summons filed.
Alias summons exit Returnable 1st Monday in November, 1928.
Nov. 5th. Appearance of Ballard, Spahr, Andrews and Madeira for Globe Indemnity Co., filed.
Nov. 7th. Affidavit of defense of Globe Indemnity Co. and New Matter filed. Notice to reply to new matter filed.
20th. Alias summons returned: "on November 2nd served" and filed.

1930.

May 23rd. Petition for requisition on Comptroller General to furnish certified copies of certain papers and decree granting petition filed.
June 21st. Certified photostat copy of certificate of settlement 0165447 filed.

[fol. 2]

Oct. 8th. Præcipe to place case on trial list filed.

1931.

Jan. 9th. Præcipe to place case on trial list filed.
Mar. 17th. Answer by plaintiff to New Matter filed.
May 29th. Agreement of counsel to try case before the court without a jury; to amend statement of claim, to amend affidavit of defense, etc. filed.

1932.

Mar. 21st. Trial before court without a jury.
Apl. 8th. Testimony filed.
July 15th. Opinion, Kirkpatrick, J., granting leave to enter judgment in favor of defendant filed.
July 27th. Præcipe to enter judgment in favor of Globe Indemnity Co. defendant filed.
27th. Judgment in favor of Globe Indemnity Co. defendant filed.
28th. Exceptions and order of court allowing exceptions filed.
Oct. 17th. Petition for and order of Court allowing appeal filed.
18th. Assignments of error filed.
19th. Bond sur appeal, in $250, with U. S. Fidelity & Guaranty Company, surety, and order of Court approving bond, filed.
20th. Citation allowed and issued.
20th. Copy of notice of appeal filed.
25th. Citation returned, service accepted, and filed.
Nov. 2nd. Præcipe for transcript of record sur appeal filed.
" " Agreement of counsel as to certification of stenographer's record of trial filed.

[fol. 3]

" 5th. Plaintiff's requests for findings of fact, etc. filed.
" 5th. Defendant's requests and findings of fact and conclusions of law filed.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPT. SESSION, 1928

No. 14222

THE UNITED STATES OF AMERICA to the Use of STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED, and Such Other Creditors of the Sanitation Corporation, Defendant Herein, as May be Entitled to Join in This Suit,

vs.

THE SANITATION CORPORATION, Incorporated under the Laws of the State of Delaware; A. Bruce Bielaski, Receiver in Bankruptcy of the said Sanitation Corporation, Defendant Herein, and Globe Indemnity Company, Incorporated under the Laws of the State of New York

STATEMENT OF CLAIM OF STEACY-SCHMIDT MANUFACTURING COMPANY—Filed Oct. 17, 1928

The plaintiff, Steacy-Schmidt Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, claims to recover from the Sanitation Corporation, incorporated under the laws of the State of Delaware; A. Bruce Bielaski, [fol. 4] Receiver in Bankruptcy of the said Sanitation Corporation, defendant herein, and the Globe Indemnity Company, incorporated under the laws of the State of New York, the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, with interest thereon from February 25th, 1927, upon a cause of action of which the following is a statement.

(1) That heretofore and on or about May 29th, 1926, the defendant, The Sanitation Corporation, entered into a formal contract with the United States of America for the prosecution and completion of a public work, to wit, the furnishing of two 48" needle valves which the United States of America required for installation in the Umatilla (McKay Dam) Irrigation Project.

(2) That a true and complete copy of the said contract between said defendant, The Sanitation Corporation, and the United States of America is hereto attached, marked Exhibit "A" and hereby made a part hereof.

(3) That in and by the terms and conditions of said contract between said defendant, The Sanitation Corporation, and the United States of America the same was to be completed by the delivery of said needle valves by the said defendant, The Sanitation Corporation, to the United States of America "F. O. B. Cars, Catasauqua, Pennsylvania" which is within the Eastern District of Pennsylvania.

(4) That in and by the terms and conditions of said contract between said defendant, The Sanitation Corporation, and the United States of America, the latter agreed to pay to said defendant, The Sanitation Corporation, for said [fol. 5] needle valves the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars.

(5) That in accordance with the terms and conditions of said contract between said defendant, The Sanitation Cor-

poration, and the United States of America, and as required by the Act of Congress, commonly known as the Heard Act (Sec. 270 United States Code; Act of Congress of August 13th, 1894, Ch. 280, 28 Stat. 278 as amended by the Act of February 24th, 1905, Ch. 778, 33 Stat. 811; and by the Act of March 3rd, 1911, Ch. 231, Sec. 291, 36 Stat. 1167) said defendant, the Sanitation Corporation, was required to execute a penal bond with good and sufficient sureties in the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars to the effect that said defendant, The Sanitation Corporation, would promptly make payment to all persons supplying it with labor and materials in the prosecution of the work provided for in said contract between said defendant, The Sanitation Corporation, and the United States of America, and that thereupon and accordingly said defendant, The Sanitation Corporation, as principal, and said defendant, The Globe Indemnity Company, as surety, did, in accordance with said contract and said Acts of Congress, execute and deliver their certain bond dated June 8th, 1926, of which a true and complete copy is hereto attached, marked Exhibit "B" and hereby made a part hereof.

(6) That at the request of said defendant, The Sanitation Corporation, said plaintiff supplied said defendant, The Sanitation Corporation, with labor and materials in the prosecution of the work provided for in said contract between said defendant, The Sanitation Corporation, and [fol. 6] the United States of America and that at the request of said defendant, The Sanitation Corporation, said plaintiff manufactured said needle valves and/or caused the same to be manufactured and on behalf of and at the request of the said defendant delivered the same to the United States of America which accepted and used said needle valves as hereinafter set forth, and that said defendant, The Sanitation Corporation, promised and agreed to pay to said plaintiff therefor the sum of Fifteen Thousand Two Hundred Five ($15,205.00) Dollars. That the valves, labor and materials furnished by the plaintiff to the defendant, The Sanitation Corporation, as aforesaid were necessary for, and were actually used in the prosecution, carrying out and completion of said contract between the defendant, The Sanitation Corporation, and the United States of America, and that the same were duly accepted

by the defendant, The Sanitation Corporation, and by the United States of America and used in the Project aforesaid.

(7) That the completion and final settlement of said contract between the Defendant, The Sanitation Corporation, and the United States of America, occurred on or about October 29, 1927, at which time the United States of America made final settlement, and that payment to said Defendant, The Sanitation Corporation, under said contract and for said valves took place on or about November 5, 1927.

[This paragraph is printed as amended. See agreement of counsel, page 29.]

(8) On account of the said sum of Fifteen Thousand Two Hundred Five ($15,205.00) Dollars there was paid on [fol. 7] account on June 1st, 1928, the sum of Two Thousand Seventy Dollars and Thirty Cents ($2,070.30) leaving a balance due of Thirteen Thousand One Hundred Thirty Four Dollars and Seventy Cents ($13,134.70) due for the price of the said valves, labor and materials furnished as aforesaid by the plaintiff to the defendant, The Sanitation Corporation, which said balance has not been paid to the said plaintiff although demand therefor has been made upon the said Sanitation Corporation, defendant, and payment refused. Plaintiff further avers that demand has been duly made on the defendants herein for the payment of the sum of Six Thousand Two Hundred Fifty $6,250.00) Dollars, and interest thereon, under the terms of the said bond, and payment thereof was refused by the said defendants.

(9) That no suit has been brought by the United States of America against either of the defendants upon said contract or upon said bond and that more than six (6) months have elapsed since the completion and final settlement of said contract between the defendant, The Sanitation Corporation, and the United States of America, and that the plaintiff, in accordance with the Statutes hereinabove referred to, has been furnished with a certified copy of said contract and said bond.

(10) That a petition in involuntary bankruptcy was filed against the Sanitation Corporation, defendant, in the

United States District Court for the Southern District of New York on September 20th, 1928, and in the said proceedings A. Bruce Bielaski was duly appointed receiver and qualified for the said office in accordance with the order of the said court.

[fol. 8] (11) The plaintiffs, Steacy-Schmidt Manufacturing Company, claim of the defendants and each and all of them the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, together with interest thereon from February 25th, 1927.

Samuel W. Cooper, Attorney for Plaintiff.

Duly sworn to by John J. Cadot. Jurat omitted in printing.

(Exhibits "A" and "B" are printed as a part of the notes of testimony, the contract at page 23 and the bond at page 25.)

[fol. 9] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE OF GLOBE INDEMNITY COMPANY, ONE OF THE DEFENDANTS ABOVE NAMED—Filed Nov. 7, 1928

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

M. A. Craig, being duly sworn according to law, deposes and says that he is Vice President of the Globe Indemnity Company, one of the above named defendants, and authorized to make this affidavit on its behalf; that Globe Indemnity Company has a just, true and complete defense to the whole of plaintiff's claim of the following nature and character, to wit:

1. This defendant admits the averments of paragraph 1 of the Statement of Claim.

2. This defendant admits the averments of paragraph 2 of the Statement of Claim except that the copy of the contract mentioned therein and attached to the Statement as Exhibit "A" is not complete in that the schedule of adver-

tisement and the specifications No. 447 referred to in said contract are not set forth in the copy so displayed as Exhibit "A".

3. This defendant admits the averments in paragraph 3 of the Statement of Claim.

4. This Defendant admits the averments in paragraph 4 of the Statement of Claim.

5. This Defendant admits the averments in paragraph 5 of the Statement of Claim.

6. This Defendant admits the averments in paragraph 6 of the Statement of Claim.

[fol. 10] 7. This Defendant admits that the United States of America made final payment to the defendant, The Sanitation Corporation, under the said contract for the said valves on or about November 5, 1927. This Defendant denies that final settlement of the said contract between the defendant, The Sanitation Corporation, and the United States of America occurred on or about October 29th, 1927, and to the contrary avers that such final settlement was made on or about June 16, 1927, and prior to October 17, 1927, by the fixing administratively by the proper Governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation, under said contract.

[This paragraph is printed as amended. See agreement of counsel, page 29.]

8. This Defendant admits the averments in paragraph 8 of the Statement of Claim.

9. This Defendant admits the averments in paragraph 9 of the Statement of Claim.

10. This Defendant admits the averments in paragraph 10 of the Statement of Claim.

11. This Defendant denies that there is due the plaintiff from this defendant the amount of $6,250.00, together with interest thereon from February 25, 1927, or any other amount whatsoever.

NEW MATTER

For further defense and by way of new matter, Defendant avers:

[fol. 11] 1. That on or about June 16, 1927, and prior to October 17, 1927, final settlement was made under the aforesaid contract between the defendant, The Sanitation Corporation, and the United States of America, by the fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation, under said contract, and that this suit was not commenced until October 17, 1928, which was after the expiration of the period of one year from and after the date of final settlement under the said contract as aforesaid, and that therefore, under the provisions of the Act of Congress, commonly known as the Hurd Act (Sec. 270, U. S. Code; Act of Congress Aug. 13, 1894, Ch. 280, 28 Stat. 278, as amended by the Act of Feb. 24, 1905, Ch. 778, 33 Stat. 811), the right of the plaintiff to bring suit upon the bond mentioned in the Statement of Claim as aforesaid has lapsed and that the plaintiff is without right to have or maintain this action against this Defendant and any and all liability of this Defendant to the plaintiff has ceased and determined.

(Sgd.) M. A. Craig.

Sworn to and subscribed before me this 7th day of November, 1928. My commission expires March 6th, 1931. (Sgd.) Wm. R. Spofford, Notary Public.

[fol. 12] IN UNITED STATES DISTRICT COURT

ANSWER OF STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED, TO THE NEW MATTER AS SET FORTH IN THE AFFIDAVIT OF DEFENSE OF THE GLOBE INDEMNITY COMPANY, INCORPORATED—Filed Mar. 17, 1931

In Answer to the new matter set forth in the Affidavit of Defense filed by the Globe Indemnity Company, Steacy-Schmidt Manufacturing Company, Incorporated, plaintiffs herein, deny that on or about June 16th, 1927, final settle-

ment was made under the contract between the defendant, The Sanitation Corporation, and the United States of America, by fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation; under the said contract and the plaintiffs aver that the said administrative settlement of the amount due was not made until October 26th, 1927; and final payment thereon was made on November 5th, 1927, and the plaintiffs aver that the suit upon the said bond was brought within the proper time, as fixed by the Hurd Act and the amendments thereto and that the defendant is liable to the plaintiff for the amount claimed in this action.

John J. Cadot, Treasurer.

Duly sworn to by John J. Cadot. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

Statement of Evidence

Before Hon. William H. Kirkpatrick, J.

Philadelphia, Pa., Monday, March 21, 1932.

Present:

Samuel W. Cooper, Esq., and Russell C. Gourley, Esq., for Plaintiff;

Frederic L. Ballard, Esq., for Defendant.

PLAINTIFF'S EVIDENCE

Mr. Cooper: If Your Honor pleases, this is a case brought to recover the sum of $6,250.00 from the Globe [fol. 14] Indemnity Company, who were the bondsmen on a Government contract under the Heard Act. The facts in the case are developed by the admissions and agreements of counsel, so that there are no witnesses orally to be examined. I will read the statements in the statement of

claim, and have my associate, Mr. Gourley, read the answers, so that we can have those properly on the record.

First—

The Court: Pardon me, may I have the file in the case? Yes, I have it here, it is all right.

Mr. Cooper: One, this is:

"That heretofore and on or about May 29th, 1926, the defendant, The Sanitation Corporation, entered into a formal contact with the United States of America for the prosecution and completion of a public work, to wit, the furnishing of two 48" needle valves which the United States of America required for installation in the Umatilla (McKay Dam) Irrigation Project."

Mr. Gourley: The affidavit of defense, paragraph 1:

"This defendant admits the averments of paragraph 1 of the Statement of Claim."

Mr. Cooper: 2:

"That a true and complete copy of the said contract between said defendant, The Sanitation Corporation, and the United States of America is hereto attached, marked Exhibit 'A' and hereby made a part hereof."

Mr. Gourley: Paragraph 2 of the affidavit of defense:

[fol. 15] "This defendant admits the averments of paragraph 2 of the Statement of claim except that the copy of the contract mentioned therein and attached to the Statement as Exhibit 'A' is not complete in that the schedule of advertisement and the specifications No. 447 referred to in said contract are not set forth in the copy so displayed as Exhibit 'A'."

Mr. Cooper: 3:

"That in and by the terms and conditions of said contract between said defendant, The Sanitation Corporation, and the United States of America the same was to be completed by the delivery of said needle valves by the said defendant. The Sanitation Corporation, to the United States of America 'F. O. B. Cars, Catasauqua, Pennsylvania' which is within the Eastern District of Pennsylvania."

Mr. Gourley: Paragraph 3 of the affidavit of defense:

"This defendant admits the averments in paragraph 3 of the Statement of Claim.

Mr. Cooper: 4:

"That in and by the terms and conditions of said contract between said defendant The Sanifation Corporation, and the United States of America, the latter agreed to pay to said defendant, The Sanitation Corporation, for said needle valves the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars."

Mr. Gourley: Paragraph 4 of the affidavit of defense:

"This defendant admits the averments in paragraph 4 of the Statement of Claim."

[fol. 16] Mr. Cooper: 5:

"That in accordance with the terms and conditions of said contract between said defendant, The Sanitation Corporation, and the United States of America, and as required by the Act of Congress, commonly known as the Heard Act (Sec. 270 United States Code; Act of Congress of August 13th, 1894, Ch. 280, 28 Stat. 278 as amended by the Act of February 24th, 1905, Ch. 778, 33 Stat. 811; and by the Act of March 3rd, 1911, Ch. 231, Sec. 291, 36 Stat. 1167) said defendant, the Sanitation Corporation, was required to execute a penal bond with good and sufficient sureties in the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars to the effect that said defendant, The Sanitation Corporation, would promptly make payment to all persons supplying it with labor and materials in the prosecution of the work provided for in said contract between said defendant, The Sanitation Corporation, and the United States of America, and that thereupon and accordingly said defendant, The Sanitation Corporation, as principal, and said defendant, The Globe Indemnity Company, as surety, did, in accordance with said contract and said Acts of Congress, execute and deliver their certain bond dated June 8th, 1926, of which a true and complete copy is hereto attached, marked Exhibit 'B' and hereby made a part hereof."

Mr. Gourley: Paragraph 5 of the affidavit of defense:

"This defendant admits the averments in paragraph 5 of the Statement of Claim."

Mr. Cooper: 6:

"That at the request of said defendant, The Sanitation Corporation, said plaintiff supplied said defendant, The [fol. 17] Sanitation Corporation, with labor and materials in the prosecution of the work provided for in said contract between said defendant, The Sanitation Corporation, and the United States of America and that at the request of said defendant, The Sanitation Corporation, said plaintiff manufactured said needle valves and/or caused the same to be manufactured and on behalf of and at the request of the said defendant delivered the same to the United States of America which accepted and used said needle valves as hereinafter set forth, and that said defendant, The Sanitation Corporation, promised and agreed to pay to said plaintiff therefor the sum of Fifteen Thousand Two Hundred Five ($15,205.00) Dollars. That the valves, labor and materials furnished by the plaintiff to the defendant, The Sanitation Corporation, as aforesaid were necessary for, and were actually used in the prosecution of carrying out and completion of said contract between the defendant, The Sanitation Corporation, and the United States of America, and that the same were duly accepted by the defendant, The Sanitation Corporation, and by the United States of America and used in the Project aforesaid."

Mr. Gourley: Paragraph 6 of the affidavit of defense:

"This defendant admits the averments of paragraph 6 of the Statement of Claim."

Mr. Cooper: 7:

"That the completion and final settlement of said contract between the defendant, The Sanitation Corporation, and the United States of America occurred on or about November 5th, 1927, at which time the United States of America made final settlement and payment to said defendant, The Sanitation Corporation, under said contract and for said valves."

[fol. 18] Mr. Gourley: Paragraph 7 of the affidavit of defense:

"This Defendant admits that the United States of America made final payment to the defendant, The Sanitation Corporation, under said contract for the said valves on or about November 5, 1927. This Defendant denies that final settlement of the said contract between the defendant, The Sanitation Corporation, and the United States of America occurred on or about November 5, 1927, and to the contrary avers that such final settlement was made on or about June 16, 1927, and prior to October 17, 1927, by the fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation, under said contract."

Mr. Cooper: Now, of course, that paragraph of the affidavit of defense is not admitted, but I am reading it because we have an answer to some of these things, and I think it is best to get the whole thing on the record. Of course, we do not admit that that statement in the affidavit of defense is correct.

8. "On account of the said sum of Fifteen Thousand Two Hundred Five ($15,205.00) Dollars there was paid on account on June 1st, 1928, the sum of Two Thousand Seventy Dollars and Thirty Cents ($2,070.30) leaving a balance due of Thirteen Thousand One Hundred Thirty Four Dollars and Seventy Cents ($13,134.70) due for the price of the said valves, labor and materials furnished as aforesaid by the plaintiff to the defendant, The Sanitation Corporation, which said balance has not been paid to the said plaintiff although demand therefor has been made upon the said Sanitation Corporation, defendant, and payment refused. [fol. 19] Plaintiff further avers that demand has been duly made on the defendants herein for the payment of the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, and interest thereon, under the terms of the said bond, and payment thereof was refused by the said defendants."

Mr. Gourley: Paragraph 8 of the affidavit of defense:

"This defendant admits the averments in paragraph 8 of the Statement of Claim."

Mr. Cooper: 9:

"That no suit has been brought by the United States of America against either of the defendants upon said contract or upon said bond and that more than six (6) months have elapsed since the completion and final settlement of said contract between the defendant, The Sanitation Corporation, and the United States of America, and that the plaintiff, in accordance with the Statutes hereinabove referred to, has been furnished with a certified copy of said contract and said bond."

Mr. Gourley: Paragraph 9 of the affidavit of defense:

"This Defendant admits the averments in paragraph 9 of the Statement of Claim."

Mr. Cooper: 10:

"That a petition in involuntary bankruptcy was filed against the Sanitation Corporation, defendant, in the United States District Court for the Southern District of New York on September 20th, 1928, and in the said proceedings A. Bruce Bielaski was duly appointed receiver and qualified for the said office in accordance with the order of the said court."

[fol. 20] Mr. Gourley: Paragraph 10 of the affidavit of defense:

"This Defendant admits the averments in paragraph 10 of the Statement of Claim."

Mr. Cooper: 11:

"The plaintiffs, Steacy-Schmidt Manufacturing Company, claim of the defendants and each and all of them the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, together with interest thereon from February 25th, 1927."

Mr. Gourley: Paragraph 11 of the affidavit of defense:

"This Defendant denies that there is due the plaintiff from this defendant the amount of $6,250.00, together with interest thereon from February 25, 1927, or any other amount whatsoever."

Mr. Cooper: Now, you better read the new matter and I will read the answer, so we get that all on the record. I think there is new matter there, isn't there?

Mr. Gourley: Yes, new matter, defendant's new matter, paragraph 1:

"That on or about June 16, 1927, and prior to October 17, 1927, final settlement was made under the aforesaid contract between the defendant, The Sanitation Corporation, and the United States of America, by the fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the [fol. 21] defendant, The Sanitation Corporation, under said contract, and that this suit was not commenced until October 17, 1928, which was after the expiration of the period of one year from and after the date of final settlement under the said contract as aforesaid, and that therefore, under the provisions of the Act of Congress, commonly known as the Hurd Act (Sec. 270, U. S. Code; Act of Congress Aug. 13, 1894, Ch. 280, 28 Stat. 278, as amended by the Act of Feb. 24, 1905, Ch. 778, 33 Stat. 811), the right of the plaintiff to bring suit upon the bond mentioned in the Statement of Claim as aforesaid has lapsed and that the plaintiff is without right to have or maintain this action against this Defendant and any and all liability of this Defendant to the plaintiff has ceased and determined."

Mr. Cooper: Now, this is the answer of the plaintiff to that new matter in the affidavit of defense:

"In answer to the new matter set forth in the Affidavit of Defense filed by the Globe Indemnity Company, Steacy-Schmidt Manufacturing Company, Incorporated, plaintiffs herein, deny that on or about June 16th, 1927, final settlement was made under the contract between the defendant, The Sanitation Corporation, and the United States of America, by fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation, under the said contract and the plaintiffs aver that the said administrative settlement of the amount due was not

made until October 26th, 1927, and final payment thereon was made on November 5th, 1927, and the plaintiffs aver that the suit upon the said bond was brought within the proper time, as fixed by the Hurd Act and the amendments thereto and that the defendant is liable to the plaintiffs for [fol. 22] the amount claimed in this action."

I now offer in evidence, I don't want to take Your Honor's time to read them all, offer in evidence the originals of the papers which are attached to the plaintiff's statement of claim, duly certified by the United States of America under the Acts of Congress, and which contain all the statements which appear in the annex to the plaintiff's statement of claim. The originals, of course, were on file with the Government, and this is a certified copy from the Government of the originals that are in their possession. I offer that in evidence.

Mr. Ballard: Is that the contract and the bond?

Mr. Cooper: Yes.

Mr. Ballard: That is Exhibits A and B to your statement of claim.

(Certified copies of Construction Contract and Bond from the General Accounting Office, Washington, were marked Plaintiff's Exhibit 1. Copies follow:

PLAINTIFF'S EXHIBIT 1

"United States of America, General Accounting Office

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered Z-1 to Z-9, inc., are true copies of the official documents now on file in the General Accounting Office in the following case: The Sanitation Corporation.

In witness whereof, I have hereunto set my hand and [fol. 23] caused the seal of the General Accounting Office to be affixed this 17th day of April, in the year 1928, at Washington.

(S.) Austin R. Ginn, Assistant Comptroller General of the United States. (Seal General Accounting Office.)

General Accounting Office form 7a.

(in writing)
JCS O 191020
card

(Stamped)

Jr

General Accounting Office

Department of the Interior 8
1
Bureau of Reclamation 4
6
Umatilla (McKay Dam) Irrigation Project 6

(Stamped)
General Accounting Office
Jun. 26, 1926
Civil Division

Construction Contract

This contract, entered into this 29th day of May, 1926, in pursuance of the act of June 17, 1902 (32 Stat., 388) and acts amendatory thereof or supplementary thereto, between the United States of America, hereinafter called the United States, represented by the officer executing this contract[1] x x x x x x x x x and the Sanitation Corporation [1]a corporation duly organized under the laws of the State of Delaware (xx) (x x x x x x) [fol. 24] x x x x x x x (x x) x x x x x x x x x x x x x x x x x x x x hereinafter called the contractor, its [1]x x x x x x x x, successors, and assigns;

2. Witnesseth, That the parties hereto do hereby mutually covenant and agree as follows:

3. The contractor, [1]under penalty of a bond conditioned upon full performance of this contract, will, according to attached advertisement, proposal, and specifications made

a part hereof, furnish and deliver f. o. b. cars Catasauqua, Pennsylvania, two (2) 48-inch balanced needle valves as

[1]Strike out any words that may not be applicable.

described under Item 1 of the Schedule of said Advertisement, and Specifications No. 447.

4. In consideration of such full performance, the contract shall be paid as provided in said specifications.

In witness whereof, the parties *have hereto* signed their names the day and year first above written.

The United States of America, by (S.) R. F. Walter, (Official Title:) Chief Engineer.

(Stamped:) Jun. 15, 1926.
(In writing:) J. R. A. H. C. G.

[fol. 25] (Two witnesses are required where the contractor is an individual or a partnership.)

The Sanitation Corporation, Contractor, by (S.) Wm. L. D'Olier, (Title:) President.

[1]P. O. address

Attest (S.) James M. Kelly, Secretary, 165 Broadway, New York, N. Y.

P. O. Address

P. O. Address

P. O. Address

P. O. Address

Approved: ————, 192-

[1]See Instructions, page 4 of this contract form.

PLAINTIFF'S EXHIBIT 1

Department of the Interior, Bureau of Reclamation

Bond

Know all men by these presents, That we the Sanitation Corporation, a corporation duly organized under the laws of the State of Delaware and doing business in New York City, County of New York and State of New York, principal, and Globe Indemnity Company, of New York, County [fol. 26] of New York and State of New York, and ——— ———, of ———, County of ——— and State of ———, Sureties, are held and firmly bound unto the United States of America in the sum of Six thousand two hundred fifty Dollars ($6,250.00), lawful money of the United States, for which payment, well and truly to be made, we bind ourselves and each of us, our, and each of our heirs, executors, administrators, and assigns, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals and attested by our signatures, at New York, this 8th day of June, in the year of our Lord one thousand nine hundred and twenty-six.

The nature of this obligation is such that if the said principal, its successors and assigns, or any of them, shall, and do in all things well and truly observe, perform, fulfill, accomplish, and keep all and singular the covenants, conditions, and agreements whatsoever, which on the part of the said principal, its successors and assigns, are, or ought to be, observed, performed, fufilled, accomplished, and kept, comprised, or mentioned in certain articles of agreement, bearing date the 29th day of May, one thousand nine hundred and twenty-six between the said principal and the United States of America acting in this behalf by R. F. Walter, Chief Engineer, concerning the furnishing of two 48-inch balanced needle valves under Item I of the Schedule of Specifications No. 447—Umatilla (McKay Dam) project, according to the true intent and meaning of said articles of agreement, and shall promptly make payment to all persons supplying labor and materials for the prosecution [fol. 27] of the work provided for, then the above obligation to be void; otherwise to remain in full force and virtue.

In witness whereof the said principal and sureties have hereunto subscribed their hands and affixed their seals

(Name of company.)		(Principal and sureties sign and affix seals. See instructions.)
(Corporate Seal.)	The Sanitation Corporation	
Signed, sealed, and delivered in the presence of—	By (s) Wm. L. D'Olier President	
	Attest (s) James M. Kelly, Secretary	
	(Here state official character of party acting for corporation.)	
(Two witnesses to signature of each individual surety.)	Globe Indemnity Company (Seal) (P.O.address): 1 By (s) F. B. Murphy (P.O.address); 5 Title Resident Vice President (P.O.address); 3 Attest (P.O.address); 5 (s) Nora Murphy (Seal) Resident Asst. Secy (P.O.address); T	

**The clause printed in italics applies only to bonds under contracts which provide, in whole or in part, for construction or repair work on public works or buildings or for installation of machinery.

(See instructions page 4.)

(Do not permanently attach any papers to this bond unless additional affidavit of sureties or certificates of approval are required.)

[fol. 28] (See instructions on page 4.) (Stamped.)

Treasury Department, Office of the Secretary, Section of Surety Bonds, Division of Appointments

Jun. 25, 1926.

Examined, read, approved as to the within corporate surety.

(S.) J. E. Harper.

(In case of corporate sureties inclose statements required by paragraph 4 of instructions on page 4.)

7—293 c. Department of the Interior, Bureau of Reclamation. Bond for fulfillment of contract with the Sanitation Corporation for two 48-inch balanced needle valves. Spec. No. 447. Umatilla (McKay Dam) Project. Bond

dated June 8, 1926. Amount, $6,250.00. Jun. 15, 1926. Approved: R. F. Walter, Chief Engineer, Bureau of Reclamation. (In writing:) J.R.A. F.C.Y.

[fol. 29] STATE OF NEW YORK,
County of New York, ss:

On the 8" day of June, 1926, before me personally appeared Wm. L. Do'Lier, to me known, who being by me duly sworn, did depose and say, that he resides in the New York that he is the President of The Sanitation Corporation the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(S.) Marie A. Ritter, Notary Public, Kings County. Kings Co. Clerk No. 157, Reg. No. 8174. New York Co. Clerk No. 336, Reg. No. 8299. Term Expires March 30, 1928.

F&S #1358.

OFFER IN EVIDENCE

Mr. Cooper: Agreement between counsel in this case, made May 22, 1931:

"Agreement

It is hereby agreed that this case may be tried by a Judge without a Jury.

It is further agreed that Paragraph 7 of the Statement of Claim be amended to read as follows:

"That the completion and final settlement of said contract between the Defendant, the Sanitation Corporation, and the United States of America, occurred on or about October 29, 1927, at which time the United States of America made final settlement, and that payment to said Defendant, the Sanitation Corporation, under said contract [fol. 30] and for said valves took place on or about November 5, 1927."

It is further agreed that Paragraph 7 of the Affidavit of Defense be amended to read as follows:

"This Defendant admits that the United States of America made final payment to the defendant, The Sanitation Corporation, under the said contract for the said valves on or about November 5, 1927. This Defendant denies that final settlement of the said contract between the defendant, The Sanitation Corporation, and the United States of America occurred on or about October 29th, 1927, and to the contrary avers that such final settlement was made on or about June 16, 1927, and prior to October 17, 1927, by the fixing administratively by the proper Governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, the Sanitation Corporation, under said contract."

It is further agreed that copy of General Accounting Office Form #39, Certificate #0165447 and copy of letter form E. B. Finney, First Assistant Secretary of the Interior dated June 16, 1927, addressed to Claims Division, General Accounting Office, 5th and F Streets, Washington, D. C. as certified to this Court by the Assistant Comptroller General of the United States, may be offered in evidence as part of this case.

It is further agreed that the original copy of letter under date of April 9th, 1928, from Messrs. Black, Varian and Simon, Attorneys for the plaintiff, addressed to the Department of the Interior, and the original answer under date of April 17th, 1928, of the Department, may be offered in evidence with the same force and effect as if the same had been duly proven by the testimony of witnesses, [fol. 31] the same, however, to be subjected to objections by the defendants.

Copy of letter of April 9th, 1928, and copy of the original letter of April 17th, 1928, above mentioned, are hereto attached, as exhibits.

These papers which were duly certified, and show the method of settlement of this claim by the United States Government, are admitted, and we offer the same in evidence, calling the Court's attention to the fact that E. B. Finney, First Assistant Secretary of the Interior in the last paragraph of his report which was sent to the General Accounting Office makes this statement:

"The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund—4 x 502;" and the subsequent certificate of settlement which was made by the General Accounting Office, in which it appears in the last paragraph:

"In view of the foregoing and the fact that the administrative office has not approved an extension of time under paragraph 11 of Specifications No. 447, it must be concluded that the claimant company is liable to the United States for liquidated damages for 163 calendar days delay at $25.00 per day;"

and at the foot:

"Amount certified herein paid by Treasurer's check as authorized by warrant,"

November 5, 1927.

I offer those in evidence.

(Certified copies of letter dated June 16, 1927, to Claims [fol. 32] Division, General Accounting office, Fifth and F Streets, N. W., Washington, D. C., from E. B. Finney, First Assistant Secretary of the Interior; and General Accounting Office Form 39, Certificate No. 0165447 were marked Plaintiff's Exhibit 2. Copies follow:

"United States of America, General Accounting Office

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered C-1 to C-5, inc., are true copies of the official documents now on file in the General Accounting Office in the following case: United States of America to the use of Steacy-Schmidt Manufacturing Co., Inc., etc., v. The Sanitation Corporation, incorporated under the laws of Delaware, et al.

In witness whereof I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 7th day of June, in the year 1930, at Washington.

(Sgd.) Austin R. Ginn, Assistant Comptroller General of the United States. (Seal.)

[fol. 33] PLAINTIFF'S EXHIBIT 2

Department of the Interior, Washington

Address only The Secretary of the Interior. (General Accounting Office, June 16, 1927, Received. Claims Division.)

(Received G. A. O. Jun. 16, 1927.)

Jun. 16, 1927.

Claims Division, General Accounting Office, Fifth & F Streets N. W., Washington, D. C.

GENTLEMEN: I am enclosing herewith for direct settlement claim of the Sanitation Corporation of New York City, stated in the sum of $12,974.30 (including item of $474.30 for extra work) for payment in full under its contract dated May 29, 1926, for furnishing two 48 inch balanced needle valves complete, for the McKay Dam, Umatilla Federal irrigation project, Oregon, under specifications No. 447, made a part of the contract. Release on contract is attached to the voucher.

The contractor agreed to deliver the valves on or before September 15, 1926. No automatic extension of time accrued in favor of the contractor under paragraph 31 of the specifications as explained in the Chief Engineer's letter of June 4, 1927, to the Commission of Reclamation, copy herewith.

Complete delivery was not made until February 25, 1927, involving a delay of 163 days for which liquidated damages are assessable under paragraph 33 of the specifications, at the rate of $25.00 per day.

The contractor has filed a written application for extension of time (number of days indefinite) claiming the delay was due to unavoidable causes beyond its control, [fol. 34] namely, (1) strike in the shop of sub-contractor (Davies & Thomas Co.) and (2) the inability of another sub-contractor (Steacy-Schmidt Mfg. Co.) to secure steel required by the specifications for certain studs, bolts and screws.

Enclosed for your consideration is the following correspondence relative to the delay and the extension requested:

Copy of telegram, May 26, 1926 from Acting Chief Engineer to contractor.

Original telegram, May 27, 1926 from contractor to chief engineer.

Copy of telegram, May 29, 1926 from acting chief engineer to contractor.

Copy of letter, June 1, 1926 from purchasing agent to contractor.

Copy of letter, June 24, 1926 from Chief Designing engineer to contractor.

Copy of letter, July 14, 1926 from Davies & Thomas Co. to contractor.

Copy of Letter, Aug. 2, 1926 from designing engineer to contractor.

Original letter Aug. 3, 1926 from contractor to chief engineer.

Copy of letter, Aug. 16, 1926 from chief engineer to contractor.

Copy of letter, Aug. 18, 1926 from acting designing engineer to inspector.

Original letter (undated) from L. K. Maires, Asst. Engr. to Chief Engineer.

Original inspector's report dated Aug. 25, 1926.

Original letter, Sept. 16, 1926 from L. K. Maires, Asst. Engr. to Chief Engr.

Copy of inspector's report dated Sept. 16, 1926.

Original letter, Sept. 15, 1926 from contractor to chief engineer.

[fol. 35] Copy of telegram Sept. 18, 1926 from chief engineer to contractor.

Original inspector's report, Sept. 21, 1926.

Copy of letter, Oct. 1, 1926 from chief engineer to contractor.

Original letter, Oct. 9, 1926 from Steacy-Schmidt Mfg. Co. to L. K. Maires.

Original telegram, October 13, 1926 from Steacy-Schmidt Mfg. Co. to Chief Engineer.

Copy of telegram, Oct. 14, 1926 from chief engineer to Steacy-Schmidt Mfg. Co.

Original Inspector's report, Oct. 21, 1926.

Original Letter, Oct. 30, 1926 from contractor to chief engineer.

Copy of telegram, Nov. 2, 1926 from Chief Engineer to Steacy-Schmidt Mfg. Co.

Original telegram, Dec. 7, 1926 from Steacy-Schmidt Mfg. Co. to chief engineer.

Copy of inspector's report, Nov. 7, 1926.

Original letter, Nov. 12, 1926 from Asst. Engineer Maires to chief engineer.

Original inspector's report, Nov. 12, 1926.

Original inspector's report, Nov. 17, 1926.

Original inspector's report, Nov. 20, 1926.

Original telegram, Dec. 7, 1926 from Steacy-Schmidt Mfg. Co. to chief engr.

Copy of Telegram, Dec. 7, 1926 from acting chief engineer to Steacy-Schmidt Mfg. Co.

Original inspector's report, Dec. 15, 1926.

Original letter, Dec. 16, 1926 from inspector to chief engineer.

Original inspector's report, Dec. 16, 1926.

Original letter, Dec. 17, 1926 from inspector to chief engineer.

Original inspector's report, Dec. 18, 1926.

Copy of letter, Dec. 20, 1926 from acting chief engineer [fol. 36] to contractor, with contractor's invoice dated April 20, 1927.

Original letter, Dec. 27, 1926 from inspector to chief engineer.

Original inspector's report, Dec. 28, 1926.

Original letter, Jan. 10, 1927 from inspector to Engineer C. M. Day.

Copy of letter, Jan. 12, 1927 from acting engineer to contractor.

Original Letter, Jan. 17, 1927 from contractor to acting chief engineer.

Original letter, Jan. 31, 1927 from inspector to chief engineer.

Original telegram Feb. 3, 1927 from inspector to chief engineer.

Original letter, Feb. 3, 1927 from contractor to chief engineer.

Copy of letter, Feb. 4, 1927 from inspector to contractor.

Copy of letter, Feb. 7, 1927 from acting chief engineer to contractor.

Copy of letter, Feb. 7, 1927 from inspector to chief engineer.

Original letter, Feb. 7, 1927 from Steacy-Schmidt Mfg. Co. to chief engineer.

Original letter, Feb. 11, 1927 from contractor to chief engineer.

Copy of telegram, Feb. 25, 1927 from chief engineer to Steacy-Schmidt Mfg. Co.

Original letter, Feb. 25, 1927 from Steacy-Schmidt Mfg. Co. to chief engineer.

Copy of letter, Feb. 26, 1927 from chief clerk to contractor.

Original telegram, Feb. 26, 1927 from Steacy-Schmidt Mfg. Co. to chief engineer.

Original letter, Feb. 26, 1927 from contractor to chief engineer.

[fol. 37] Original letter, March 1, 1927 from contractor to chief clerk.

Original letter, March 10, 1927 from contractor to chief clerk, with copy of contractor's invoice dated March 10, 1927.

Copy of letter, March 16, 1927 from chief clerk to inspector.

Original letter, March 19, 1927 from inspector to Engineer C. M. Day.

Original letter, March 21, 1927 from inspector to Chief Engineer.

Original letter, March 22, 1927 from contractor to chief clerk.

Copy of letter, March 20, 1927 from chief engineer to contractor.

Copy of letter, March 31, 1927 from chief clerk to contractor.

Original inspector's report, April 2, 1927.

Original letter, April 12, 1927 from contractor to chief clerk.

Original consent of surety dated April 20, 1927.

Original letter, April 20, 1927 from contractor to chief engineer.

Original letter, April 20, 1927 from contractor to chief engineer, with enclosures.

Original telegram, June 1, 1927 from contractor to chief engineer.

Copy of telegram, June 1, 1927 from chief engineer to contractor.

Original telegram, June 2, 1927 from contractor to chief engineer.

Copy of telegram, June 4, 1927 from chief engineer to contractor.

Copy of letter, June 4, 1927 from chief engineer to Commissioner.

[fol. 38] As shown by the correspondence no extension is recommended by the engineer whose determination, in accordance with the provisions of paragraph 11 of the specifications governing the allowance of extensions of time, "shall be final and conclusive".

The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund—4 x 502.

Very truly yours, (Sgd.) E. B. Finney, First Assistant Secretary.

Inclosure No. 69473.
(Stamped: ——).
A true copy certified to from the record.
Attest

(S.) Leo A. Lilly, Deputy Clerk. (Seal.) Seal of the District Court of the United States, E. D. Penna.

6/23/30.

Certificate of Settlement

General Accounting Office, Form 39.
Certificate No. 0165447.
(Class:) ——

General Accounting Office, Bookkeeping Division

Int. Settlements and claims.
(Div. Bookkeeping and Warrants.)
Claim No. 0191020.
Paid Nov. 3, 1927. Wt. No. 1222.)

Washington, D. C., Oct. 26, 1927.

I certify that I have examined and settled the claim(s) of [fol. 39] The Sanitation Corporation, Graybar Building, Grand Central Terminal, New York, New York (Division of Bookkeeping and Warrants, L Oct. 31, 1927, received),

against the United States for furnishing and delivering two (2) 48-inch balanced needle valves, complete, for the McKay Dam, Umatilla Project, Oregon, in accordance with contract dated May 29, 1926, and Extra Work Order dated Dec. 20, 1926. This amount is accepted as full and final payment of all claims and demands arising out of contract of May 29, 1926, and Extra Work Order dated Dec. 20, 1926, payment whereof is accepted in absolute release and discharge of the United States. And find that the sum of eight thousand, eight hundred ninety-nine dollars and thirty cents is due from the United States to said claimant(s), payable from the appropriation(s) 4X502, Reclamation Fund, Special Fund; Claimed, $12,974.30; Deducted, $4,075.00; Payable $8,899.30.

There is deducted the sum of $4,075.00, representing the amount of liquidated damages accruing for failure to complete the work within the time specified in contract dated May 29, 1926.

The claimant company agreed to make complete delivery on or before Sept. 15, 1926; whereas complete delivery was not accomplished until Feb. 25, 1927, which resulted in a delay of 163 calendar days.

The claimant company contend that a portion of the above indicated delay was caused by a strike in the plant of the first subcontractor Davies and Thomas Company, Catasauqua, Pa. The evidence in the case establishes the fact that internal labor trouble developed at the plant of [fol. 40] the Davies and Thomas Co., during the latter part of April, 1926, and continued until the latter part of July, 1926.

The Davies and Thomas Company, by letter dated July 14, 1926, withdrew its quotation of June 25, 1926, for furnishing to the claimant company the two needle valves called for under contract of May 29, 1926. Thereupon the claimant company on July 19, 1926 placed an order with a second sub-contractor, Steacy-Schmidt Co., York, Pa., to furnish the needle valves.

In view of the fact that a strike existed at the plant of Davies and Thomas Company at the time the contract of May 29, 1926, was awarded the claimant company, the contractor could have avoided any possible delay incident to such strike by negotiating with another sub-contractor in

the beginning instead of waiting almost two months before placing its order with a second sub-contractor.

Under the contract of May 29, 1926, the claimant company was not obligated to award the subcontract to Davies and Thomas Co., because the latter company was not named in said contract, nor did the granting of the subcontract to Davies and Thomas Company form a consideration in making the award of May 29, 1926, to the claimant company.

The evidence also discloses the fact that although the claimant company placed its order with Steacy-Schmidt Co. on July 19, 1926, the latter company had been unable to secure certain materials as late as Sept. 7, 1926. The delay due to the inability of the second subcontractor to secure necessary materials is not such a delay which the contract of May 29, 1926, recognizes as excusable or unavoidable and can not be attributed to any of the causes specified therein.

The claimant company contends that it was further de- [fol. 41] layed because of the failure of the United States to make prompt inspections and tests of the materials at the plant of the second subcontractor. The evidence in the case fails to disclose any unreasonable delay on the part of the United States in making such inspections and tests.

In view of the foregoing and the fact that the administrative office has not approved an extension of time under paragraph 11 of Specifications No. 447, it must be concluded that the claimant company is liable to the United States for liquidated damages for 163 calendar days delay at $25.00 per day.

Issue warrant(s) and send same as above.

J. R. McCarl, Comptroller General, by (Sgd.) E. B. Hilley.

$8,899.30. ag. Posted Oct. 29, 1927.

To the Secretary of the Treasury (Division of Bookkeeping and Warrants. C-1 c".)

Amount certified herein paid by Treasurer's check as authorized by warrant, J, Nov. 5, 1927.

Treasurer, U. S.

Mr. Cooper: Do you still object to these April 9th letters?

Mr. Ballard: Yes Mr. Cooper, not at all as to the form, of course, in which they are offered, but I object to them

because they prove nothing but the date of payment, No-
[fol. 42] vember 5th. Now, the date of payment, November 5th, is averred in the pleadings, and admitted, and is already in the record, and I think as you have amended your pleadings you will agree with me that the date of payment is never an index of the date of settlement. I understand that the writer of the inquiry to Washington, that is, the writer of the first letter, hoped to get different information, but the reply that he got simply says that the date of payment was November 5th. I think, therefore, the letters are immaterial.

Mr. Cooper: There are a number of cases, if Your Honor please, which seem to show that where the United States Government undertakes itself to tell contractors what the date of settlement was that they are more or less bound by that if no intervening rights occur, and these letters, I think Your Honor could admit them and then throw them out if you finally conclude——

The Court: I will take them subject to the objection, surely, but what is the exact language of the Act? What does the Act say?

Mr. Cooper: I beg your pardon?

The Court: What does the Act of Congress say?

Mr. Ballard: Heard Act?

The Court: Yes, final settlement, or——

Mr. Cooper: Final settlement.

Mr. Ballard: Mr. Cooper, I have it here, as quoted in the Pieler case.

Mr. Cooper: That is old, that Pieler case. Your Honor, shall I read it to you, or shall I hand it to you?

[fol. 43] The Court: Just those words. Is it final settlement?

Mr. Ballard: If no suit should be brought by the United States within six months from the completion and final settlement of said contract then the person or persons supplying the contractor may sue on the bond; I am paraphrasing from then on.

The Court: Completion and final settlement?

Mr. Ballard: Completion and final settlement of said contract.

The Court: All right.

Mr. Cooper: I will read these letters and put them on the record, if Your Honor please.

The Court: All right.

Mr. Cooper: This is a copy of a letter written by Black, Varian and Simon on behalf of the plaintiff to the Depart ment of the Interior:

April 9th, 1928.

Department of the Interior, General Accounting Office

Re Steacy-Schmidt Manufacturing Company vs. The Sanitation Corporation

GENTLEMEN: Our client, Steacy-Schmidt Manufacturing Company of York, Pennsylvania, furnished certain material and labor to The Sanitation Corporation which had a contract with the Department of the Interior, Bureau of Reclamation, for two 48-inch needle valves for the McKay Dam, Umatilla Irrigation Project in Oregon under specifications number 447. We will enclose customary affidavit under the Heard Act and will appreciate it if you will promptly send us a certified copy of the contract and of the bond.

[fol. 44] Will you also kindly inform us as to the date of the 'completion and final settlement' of the contract between The Sanitation Corporation and the Department of the Interior.

Thanking you for the courtesy of an immediate reply, we are,

Very truly yours, Black, Varian and Simon.

HMS:SW.
Enc."

The answering letter from the General Accounting Office at Washington:

"General Accounting Office, Washington

R-P.

April 17, 1928.

Black, Varian and Simon, Attorneys and Counsellors, Court Square Building, 2 Lafayette Street, New York, N. Y.

GENTLEMEN: Receipt is acknowledged of your communication dated April 9, 1928, enclosing affidavit of John J.

Cadot, Vice-President of the Steacy-Schmidt Manufacturing Company.

In compliance with your request there are transmitted herewith certified photostat copies of contract dated May 29, 1926, between The United States of America and The Sanitation Corporation; bond dated June 8, 1926, and attachments.

You are advised that the final payment was made November 5, 1927.

For the Comptroller General of the United States:

Respectfully, John K. Willis, Chief Clerk.

Enclosures.

R. F. M."

[fol. 45] I think that is the plaintiff's case, if Your Honor please.

Plaintiff rests.

Mr. Ballard: Your Honor, the defendant has nothing to offer. The defendant contends, as I have no doubt Your Honor has gathered, that——

The Court: Well, you submit a general point, do you? Suppose you submit a general point.

Mr. Ballard: Well, I have here a number——

The Court: Well——

Mr. Ballard: I don't know just in what form points of this kind in this kind of case ought to be submitted.

The Court: I suppose requests for findings of law.

Defendant rests.

Testimony closed.

Reported by Everett G. Rodebaugh.

[fol. 46] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

The Affidavit of Defense filed in this case admits the averments in Paragraphs 1 to 6, inclusive, and from 8 to

10, inclusive, and the Court, therefore, finds that the facts set forth in these paragraphs of the plaintiff's Statement of Claim are true and correct.

II

By an agreement filed, it is further admitted that the following correspondence passed between Messrs. Black, Varian and Simon, Attorneys for the plaintiff, and the Court finds that the letter of April 9th, 1928, addressed by the plaintiff's Attorney to the Department of the Interior and the reply thereto under date of April 17th, 1928, constitute the correspondence as admitted in the agreement between the parties to this suit. The following are copies of the letters referred to:

April 9th, 1928.

Department of the Interior, General Accounting Office, Washington, D. C.

Re Steacy-Schmidt Manufacturing Company vs. The Sanitation Corporation

GENTLEMEN: Our client, Steacy-Schmidt Manufacturing Company of York, Pennsylvania, furnished certain material and labor to The Sanitation Corporation which had a contract with the Department of the Interior, Bureau of Reclamation, for two 48-inch needle valves for the McKay Dam, Umatilla Irrigation Project in Oregon under specifications number 447. We will enclose customary affidavit under the Heard Act and will appreciate it if [fol. 47] you will promptly send us a certified copy of the contract and of the bond.

Will you also kindly inform us as to the date of the "completion and final settlement" of the contract between The Sanitation Corporation and the Department of the Interior.

Thanking you for the courtesy of an immediate reply, we are,

Very truly yours, Black, Varian and Simon.

HMS:SW.
Enc.

General Accounting Office, Washington

R-P. April 17, 1928.

Black, Varian and Simon, Attorneys and Counsellors, Court Square Building, 2 Lafayette Street, New York, N. Y.

GENTLEMEN: Receipt is acknowledged of your communication dated April 9, 1928, enclosing affidavit of John J. Cadot, Vice-President of the Steacy-Schmidt Manufacturing Company.

In compliance with your request there are transmitted herewith certified photostat copies of contract dated May 29, 1926, between The United States of America and The Sanitation Corporation; bond dated June 8, 1926, and attachments.

You are advised that the final payment was made November 5, 1927.

For the Comptroller General of the United States.

Respectfully, John K. Willis, Chief Clerk.

Enclosures.

R. F. M.

[fol. 48] III

By agreement of the parties two documents furnished by the Assistant Comptroller General of the United States regarding the question of the settlement with the United States of the claim of the Sanitation Corporation are admitted as evidence in this proceedings. The first document is in the form of a letter by the First Assistant Secretary of the Interior to the General Accounting office stating in part, "I am enclosing herewith for direct settlement claim of Sanitation Corporation of New York City" for $12,974.30 for needle valves for McKay Dam. "The claim has received administrative examination, is approved for $8,899.30, and I recommend that the amount found due be paid." The other document is in the form of a certificate signed by E. B. Hilley for the Comptroller General of General Accounting Office, reading in part, "I certify that I have examined and settled the claim of Sanitation Corporation" against the United States for the two needle valves and "find that the sum of $8,899.30 is due from the United States to said claimant." This certificate is dated Octo-

ber 26, 1927, and payment is certified to have been made November 5, 1927. It appears from the contents of these papers that the Department of the Interior did not intend to finally adjudicate the rights of the parties. The letter to the General Accounting Office clearly states that the claim is submitted to the Accounting Office for approval. It states that the claim is sent to the General Accounting Office "for direct settlement" indicating clearly that the settlement that was to be made between the government and the contractor was to be made by the General Accounting Office. On the other hand the certificate made by the General Accounting Office states specifically that the claim [fol. 49] has been "settled" by it. That certificate also makes a finding that there is a definite amount due from the United States to the claimant. The whole character of the letter and the certificate shows that the claim as sent to the General Accounting office was for inspection and approval by the General Accounting Office, all of the facts and information relating to certain deductions being given in full. On the other hand the certificate made by the General Accounting Office is in form a final certificate. It is not a submission of any matter to any other office, but sets forth the reasons why the General Accounting Office finds that there must be a reduction in the amount of the contractor's claim. From a reading of the two documents it was still within the power of the General Accounting Office to make a settlement of the maximum demanded should their consideration of the documents differ from that recommended by the Department of the Interior.

The Court, therefore, finds as a fact that there was no final settlement of the amount in dispute by the Department of the Interior and that the final settlement was made upon the action of the General Accounting Office of the Comptroller General and the Court, therefore, finds that this settlement was made on October 26th, 1927.

IV.

The court finds as a fact that the Acts provided for settlement of accounts against the government are as follows:

"All claims and demands whatever by the Government of the United States or against it * * * shall be settled and adjusted in the General Accounting Office." U. S.

Code, Title 31, Sec. 71; R. S. 236, June 10, 1921, c. 18, Sec. 305; 42 Stat. 24.

"Nothing in this chapter shall prevent the General Ac- [fol. 50] counting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time of payment which shall expire before a warrant be issued in payment of an amount certified as provided in this section."

"Disbursing officers, or the head of any executive department, * * * may apply for and the General Accounting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern such office in passing upon the account containing said disbursement." U. S. Code, Title 31, Sec. 74; July 31, 1894, c. 174, sec. 8, 28 Stat. 207; June 10, 1921, c. 18, Sec. 304, 42 Stat. 24.

"The Secretary of the Interior shall sign all requisitions for the advance or payment of monies out of the Treasury upon estimates or accounts for expenditures upon business assigned by law to his department; subject however, to adjustment and control by the proper accounting officers of the General Accounting Office." R. S. Sec. 444; June 10, 1921, c. 18, Sec. 304, 42 Stat. 24.

"The Auditor for the Interior Department shall receive and examine all accounts * * * of the Secretary of the Interior * * * and all other business within the jurisdiction of the Department of the Interior, and certify the balances arising thereon to the Division of Bookkeeping and Warrants and send forthwith a copy of each certificate to the Secretary of the Interior." July 31, 1894, c. 174, Sec. 7, 28 Stat. 206.

By the Act of June 10, 1921, c. 18, Sec. 304, 42 Stat. 24, "all powers and duties now conferred or imposed by law upon the comptroller of the Treasury or the six auditors of the Treasury Department * * * shall, so far as not [fol. 51] inconsistent with this Act be vested in and imposed upon the General Accounting Office and exercised without direction from any other officer." It would, therefore, seem that the authority given to the auditor as specified above has been transferred to the General Accounting Office, which shall exercise the same "without direction from any other officer."

Under the provisions of these Statutes, therefore, the General Accounting Office was the only office authorized and empowered to make a final settlement in behalf of the government and according to the documents submitted and the Statutes recited above this final settlement did not take place until October 26th, 1927, and the court, therefore, finds that to be the date on which the final settlement was made.

V

Under all the facts as set forth in the pleadings and in the papers and documents admitted in evidence, the court finds that the final settlement in this case took place on October 26th, 1927, and, therefore, the suit by the plaintiff in this case was brought within the proper time, as provided by the statute.

CONCLUSION OF LAW

(1) As it appears from the correspondence heretofore mentioned between the Attorneys for the plaintiff, under date of April 9th, 1928, and the Department of the Interior and the reply thereto of April 17th, by the Chief Clerk of the Comptoller General of the United States that the said Clerk advised the Attorneys that final payment was made November 5th, 1927, the Government is bound by the action of its representative and the time thus fixed in the said [fol. 52] correspondence is evidence of the fact that there was no settlement made in the matter until the adjustment of October 26th, 1927, and the Government is bound by the advices given to the Attorneys in this correspondence. American Bonding Co. vs. U. S. 233 Fed. 364 (1916).

(2) Under the facts and the statutes found by the Court as a matter of fact, the Court concludes that as a Finding of Law neither the Department of the Interior or its various bureaus has any authority under the Acts of Congress to make a final settlement of claims against the Government, but that such a final settlement must be made under the Acts, in the General Accounting Office, and the Court further finds as a matter of law that the date of final settlement in this case is the date on which the General Accounting Office finally approved the account in behalf of the Government.

This case comes definitely within the decision in Lumber Company vs. Jones, etc., 47 Fed. Rep. (2nd Series) 74, where the Court decided, on a similar state of facts, that there could be no final settlement until the General Accounting Office had approved the same.

(3) Under all the evidence in this case, the Court finds that the claim of the plaintiff has been established and that the final settlement took place on October 26th, 1927, and the plaintiff, is therefore, entitled to recover a verdict for the amount of their claim, $6,250.00, with interest from February 25th, 1927, and a verdict is, therefore entered for plaintiff in the sum of $—.

[fol. 53] IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court is respectfully requested to make the following findings of fact:

1. On the 29th day of May, 1926, the United States of America entered into a contract with The Sanitation Corporation for the furnishing of two 48" needle valves for installation in the Umatilla Irrigation project, a correct copy of which contract in writing is attached to Plaintiff's Statement of Claim.

2. Under the terms of said contract The Sanitation Corporation was obliged to furnish a bond with surety for compliance with the terms and conditions of the contract and for payment of all persons supplying labor and materials for the prosecution of the work provided for, which bond was given with Globe Indemnity Company of New York as surety. A correct copy of said bond is attached to Plaintiff's Statement of Claim.

3. Prior to June 16, 1927 the valves referred to in the contract were completed and accepted by the United States of America through the Department of the Interior, Bureau of Reclamation, which Department was authorized to enter into the said contract and, consequently, to accept and approve performance thereunder.

4. On or by June 16, 1927, the claim of The Sanitation Corporation under said contract had received administra-

tive examination and was approved in the amount of Eight Thousand, Eight Hundred Ninety-Nine Dollars and Thirty Cents ($8,899.30) by the First Assistant Secretary of the Interior.

[fol. 54] 5. The date of final settlement under the contract was June 16, 1927.

6. This suit was instituted October 17, 1928 or more than one year after final settlement under the contract.

CONCLUSIONS OF LAW

The Court is respectfully requested to make the following Conclusions of Law:

1. The date of the completion of the contract involved in this case is not later than June 16, 1927.

2. The date of final settlement under said contract is June 16, 1927.

3. An action upon the bond involved in this case to have been brought in time should have been instituted and the writ issued on or before June 16, 1928.

4. This action having been instituted on October 17, 1928, there is no right of action in the Plaintiff.

5. Under all the evidence in this case and the law, the action must be dismissed.

Morris Chester, Frederic L. Ballard, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

OPINION—SUR PLEADINGS AND PROOFS—Filed July 15, 1932

KIRKPATRICK, J.:

This is a suit by a sub-contractor upon a bond given under the Hurd Act (Act of August 13, 1894). If this suit [fol. 55] has been brought within one year after the "final settlement of said contract", the use-plaintiff is entitled to recover, because it is conceded that its contract has been fully performed and that the general contractor has not paid. The suit was begun on October 17, 1928 and the

sole question involved is whether the final settlement took place before or after October 17, 1927.

The pertinent facts are found as follows:

1. The general contractor was The Sanitation Corporation.

2. The sub-contractor had fully performed the work under his contracts, prior to June 16, 1927.

3. On June 16, 1927, the Department of the Interior, by the Secretary of the Interior (to whom the Act of June 17, 1902 had committed the authority for making the contract) wrote a letter to the General Accounting Office, in part as follows: "I am enclosing herewith for direct settlement claim of the Sanitation Corporation of New York City. * * * The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid. * * *"

4. Apparently no further action was taken by any department of the government until October 26, 1927. On that day the General Accounting Office, by the Comptroller General, issued its "Certificate of Settlement" in the following language (in part): "I certify that I have examined and settled the claim(s) of the Sanitation Corporation * * * and find that the sum of eight thousand, eight hundred ninety-nine dollars and thirty cents is due from the United States to said claimant(s) * * * Claimed [fol. 56] $12,974.30; Deducted $4,075.00; Payable $8,899.30."

5. Thereafter on November 5, 1927, the amount so certified was paid to the general contractor by Treasurer's Check.

6. The letter of June 16, 1927 from the Department of the Interior to the General Accounting Office was intended to be and was an administrative determination of the amount due under the contract.

Comment: Plaintiff relies upon Lambert Lumber vs. Jones Engineering and Construction Company, 47 Fed (2d) 74, but in that case the letter of transmittal from the administrative department charged with the work (the Veterans' Bureau) to the General Accounting Office was entirely different. It read in part, "Examined in the sum of $10,975.39 and respectfully referred to the General Ac-

counting Office for examination, settlement and approve for payment in the amount found due. * * * (Obviously the word "approve" should be read "approval".) The examination of an account is certainly not final settlement, and it was the clear intent of the letter to pass along to the General Accounting Office the function of making final settlement.

In the case at hand the letter of transmittal says that the claim has received administrative examination, "is approved for $8,899.30", and it is recommended that the amount be paid. It is difficult to say what more the Secretary of the Interior could have done toward the final settlement of the claim. He had no right actually to order it paid by the Treasury and therefore merely recommended its payment, but he did, after examination, finally and unequivocally approve it. When he said that he was send-[fol. 57] ing the claim for "direct" settlement he probably had payment in mind, a step which all authorities agree is not final settlement within the meaning of the law. The conclusion which I have reached in the foregoing findings is generally in accord with that reached by the Circuit Court of Appeals for this circuit in United States vs. Pauling, 297 Fed. 65, and Mandel vs. United States, 4 Fed. 2d) 629.

Conclusions of Law

"1. The Budget and Accounting Act of June 10, 1921, does not prevent a final settlement, within the meaning of the Heard Act, from being made by the administrative department to which the work has been committed by law.

Discussion: In the Lambert case, this point was left undecided because the court in that case found that there had been no administrative determination before the claim reached the General Accounting Office. In the case now before the court there was such determination and the question must now be met and decided.

In Illinois Surety Company vs. Peeler, 240 U. S. 214, the Supreme Court decided that action by the Secretary of the Treasury approving the statement of a supervising architect, in charge of the construction of a building under the Treasury Department, of the amount finally due, recommending that a specified sum be charged against the contractor as damages and that a voucher be issued in its

favor for the balance, was final settlement of the contract within the meaning of the Hurd Act. This case was decided before the "Budget and Accounting Act of 1921 had been [fol. 58] passed, but the Act of March 3, 1817 was in force at the time, and its pertinent language is precisely the same as that of the Act of 1921 except that it committed the function of settling and adjusting accounts to the Treasury Department instead of to the General Accounting Office. Since the Treasury Department was also the department charged with doing the work, the bearing of the decision upon a case like the present, in which the work was done by a different department than that charged with settling the account, must be determined from its rationale rather than from the facts involved.

The decision in the Peeler case proceeds upon a recognition that making the administrative determination of the amount due is a function, separate and distinct not only from paying the amount but also from the function of finally authorizing it to be paid. The court said, "but it is apparent that the word 'settlement' * * * has a well-defined meaning as denoting the appropriate administrative determination with respect to the amount due. We think that the words 'final settlement' in the Act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority." If the court had in mind the final authorization of payment by the Treasury Department under the Act of 1817, it would have been natural for it to have specified the Treasury Department as the place where the final settlement was made. Throughout, however, the reference is always to "appropriate administrative determinaiton". The Treasury Department in the Peeler case acted in two capacities, first, as an administrative department charged with doing certain work and second, as an accounting department charged with settlement and adjustment of accounts. It was clearly indicated that the Court, throughout its dis- [fol. 59] cussion, had in mind the action of the Treasury Department in the first of these capacities as the action upon which "final settlement" was predicated.

The recent decision of the Circuit Court of Appeals for the Fourth Circuit in Consolidated Indemnity, etc., Company vs. Smoot & Company (recently decided and not yet

reported) presented a somewhat different phase of the question but is in accord with the view of the Peeler case just stated. In that case there had been final action by the War Department through its constructing quartermaster but no action by the General Accounting Office. The suit was brought not less than six months but within a year after action by the War Department. The question was not whether it had been brought too late but whether, in view of the absence of action in the General Accounting Office, it had been brought too soon. Quoting United States vs. Starr, 20 Fed. (2d) 803, the court said, "There may be a final settlement between the government and the contractor, so as to fix the rights of the creditor under the statute, notwithstanding the balance may be subject to change; for when the government has clearly indicated that it has no further claim against the surety, a final settlement within the purview of the act has taken place." "We think that when the government official charged with responsibility in the premises officially determines the balance due to or from the contractor and makes a record of such determination, this is a final settlement within the meaning of the Hurd Act, notwithstanding that the accounts of disbursing officers are subject to audit in the Comptroller General's office." No confusion need arise from the court's statement "Undoubtedly where the Comptroller General actually makes the administrative determination of the amount due, as in Lambert Lumber Com-[fol. 60] pany vs. Jones Engineering & Construction Company, 47 Fed. (2) 74, his determination is the settlement within the meaning of the act." That clearly means where the Comptroller General makes the only administrative determination, because the court referred to the Lambert case and the whole basis of that decision was that the department charged with the work had never made any administrative determination.

The second conclusion of law follows from the foregoing.

2. The action of the Department of the Interior of June 16, 1927, was final settlement of the contract within the meaning of the Hurd Act.

In addition to the findings of fact contained in the foregoing opinion the Court adopts as its findings the first, second, third, fourth, fifth and sixth requests for findings submitted by the defendant, together with the facts

averred in the admitted paragraphs of the statement of claim which are paragraphs one to six, and eight to ten inclusive, also the facts contained in the agreement between the parties filed March, 1921.

Judgment may be entered for the defendant.

By the Court:

W. H. Kirkpatrick, J.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR JUDGMENT—Filed July 27, 1932

To the Clerk of said Court:

In accordance with opinion filed by the Court in the above entitled matter on July 15, 1932, please enter judg- [fol. 61] ment for Globe Indemnity Company, one of the defendants in the above entitled matter, and against the plaintiff.

(S.) Morris Cheston, (S.) Frederic L. Ballard, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

Before Kirkpatrick, J.

JUDGMENT—Filed July 27, 1932

And now, July 27, 1932, in accordance with the Opinion of the Court and by præcipe filed, Judgment is hereby entered in favor of Globe Indemnity Company, defendant, and against the plaintiff, The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated, etc.

By the Court.

Attest:

(S.) E. G. Johnson, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

EXCEPTIONS—Filed July 28, 1932

This case having been tried on March 21st, 1932, by Judge without a Jury by agreement of Counsel, the Plain-

tiff and Defendant having submitted requests for Findings of Fact and Conclusions of Law to which the Court has filed an Opinion, "Sur Pleadings and Proofs", making certain Findings of Fact and Law and permitting a judgment for defendant which was entered July 22nd, 1932; the [fol. 62] plaintiff by its Attorney, Samuel W. Cooper, Esquire, excepts to the Findings and Order of the Court, as follows:

(1) To the Findings of Fact No. 6:

"The letter of June 16, 1927, from The Department of the Interior to the General Accounting Office was intended to be and was an administrative determination of the amount due under the contract."

(2) To the Conclusion of Law No. 1:

"The Budget and Accounting Act of June 10, 1921, does not operate to prevent a final settlement, within the meaning of the Hurd Act, from being made by the administrative department to which the work has been committed by law."

(3) To the Conclusion of Law No. 2:

"The action of the Department of the Interior of June 16, 1927, was final settlement of the contract within the meaning of the Hurd Act."

(4) To the adoption of defendant's Fifth and Sixth requests for Findings of Fact:

"5. The date of final settlement under the contract was June 16, 1927.

"6. This suit was instituted October 17, 1928, or more than one year after final settlement under the contract."

(5) To the Court's Order:

"Judgment may be entered for the defendant."

(6) The refusal of the Court to affirm plaintiff's Fifth request for Finding of Fact:

[fol. 63] "Under all the facts as set forth in the pleadings and in the papers and documents admitted in evidence, the Court finds that the final settlement in this case took place on October 26th, 1927, and, therefore, the suit by the

plaintiff in this case was brought within the proper time, as provided by the statute."

(7) To the refusal of the Court to affirm plaintiff's Third request for Conclusion of Law:

"Under all the evidence in this case, the Court finds that the claim of the plaintiff has been established and that the final settlement took place on October 26th, 1927, and the plaintiff is, therefore, entitled to recover a verdict for the amount of their claim, $6,250,00, with interest from February 25th, 1927, and a verdict is, therefore, entered for plaintiff in the sum of $—."

Samuel W. Cooper, Attorney for Plaintiff.

The above exceptions are allowed.

W. H. Kirkpatrick, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR ALLOWANCE OF APPEAL—Filed Oct. 17, 1932

To the Honorable the judges of said Court:

The Petition of Steacy-Schmidt Manufacturing Company, Incorporated, the use plaintiff in the above entitled case, respectfully represents:

1. That it brought the above suit under the above term and number claiming it was entitled to recover of the de-
[fol. 64] fendants the sum of $6,250.00 with interest; that the case was tried by a Judge without a jury and that the Honorable W. H. Kirkpatrick filed an opinion making certain findings in favor of the defendant and judgment in favor of the defendant was entered thereon July 27th, 1932.

2. Your petitioner is advised by counsel and verily believes that it has a just claim against the defendants and that the finding of the court and the judgment should have been in favor of the plaintiff and that a review of the proceedings will so show.

Wherefore your petitioner prays that an appeal be allowed from the judgment of your Honorable Court to the United States Circuit Court of Appeals.

Steacy-Schmidt Manufacturing Company, Inc., by
Samuel W. Cooper, Attorney.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

And now, this 15th day of Oct., A. D. 1932, upon consideration of the foregoing Petition and upon motion of Samuel W. Cooper, Esquire, Attorney for the plaintiff, it is ordered and decreed that an appeal be allowed to the United States Circuit Court of Appeals from the judgment entered in favor of the defendant Globe Indemnity Company, July 27th, 1932.

Plaintiff to furnish bail in the amount of $250.00.

Kirkpatrick, J.

[fol. 65] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Oct. 18, 1932

1. The Learned trial Court erred in making its Sixth finding of fact, to which an exception was filed by and allowed to the plaintiff:

"6. The letter of June 16, 1927, from The Department of the Interior to the General Accounting Office was intended to be and was an administrative determination of the amount due under the contract."

2. The Learned trial Court erred in making its First conclusion of law, to which an exception was filed by and allowed to the plaintiff:

"1. The Budget and Accounting Act of June 10, 1921, does not operate to prevent a final settlement, within the meaning of the Hurd Act, from being made by the administrative department to which the work has been committed by law."

3. The Learned trial Court erred in making its Second conclusion of law, to which an exception was filed by and allowed to the plaintiff:

"2. The action of the Department of the Interior of June 16, 1927, was final settlement of the contract within the meaning of the Hurd Act."

4. The Learned trial Court erred in confirming the defendant's Fifth and Sixth request for finding of fact, to

which an exception was taken by and allowed to the plaintiff, said request being as follows:

"5. The date of final settlement under the contract was June 16, 1927."

"6. This suit was instituted October 17, 1928, or more than one year after final settlement under the contract."

[fol. 66] 5. The Learned trial Court erred in entering the following order, to which an exception was duly taken and allowed:

"Judgment may be entered for the defendant."

6. The Learned trial Court erred in refusing to confirm plaintiff's Fifth request for finding of fact, to which an exception was duly taken and allowed, said request being as follows:

"5. Under all the facts as set forth in the pleadings and in the papers and documents admitted in evidence, the Court finds that the final settlement in this case took place on October 26th, 1927, and, therefore, the suit by the plaintiff in this case was brought within the proper time, as provided by the statute."

7. The Learned trial Court erred in refusing to confirm plaintiff's Third request for a conclusion of law, to which an exception was filed by and allowed to the plaintiff, said request being as follows:

"3. Under all the evidence in this case, the Court finds that the claim of the plaintiff has been established and that the final settlement took place on October 26th, 1927, and the plaintiff is, therefore, entitled to recover a verdict for the amount of their claim, $6,250.00, with interest from February 25th, 1927, and a verdict is, therefore, entered for plaintiff in the sum of $—."

S. W. Cooper, Attorney for Plaintiff.

[fol. 67] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD ON APPEAL—Filed November 2, 1932

Clerk of the United States District Court, Post Office Building, Philadelphia.

DEAR SIR: In the above case will you kindly certify for the record on appeal the following:

Docket Entries.

Statement of Claim and exhibits.

Affidavit of Defence and New Matter of Globe Indemnity Company.

Answer of plaintiff to New Matter.

Stenographer's record of the trial, except for the following pages which are to be omitted:

Pages 18, 19, and 20 consisting of a form of affidavit not filled in and instructions for the execution of the contract.

Bottom half of page 24 beginning with "Affidavits of individual sureties", pages 25, 26, 27, 28, 29, and 30 and the upper part of page 31 ending with the words, "if required by existing law", said pages consisting of blank forms of affidavits and directions and instructions for the execution of the bond.

Last half of page 33, pages 34, 35, 36, 37, 38 and first half of page 39 ending with the words, "commission expires March 30, 1927".

Plaintiff's exhibits as contained in the stenographer's record consisting of the following:

1. Certified copy of the General Accounting Office form No. 39, Certificate No. 0165447.

[fols. 68 & 69] 2. Certified copy of letter of June 16, 1927, First Assistant Secretary of Interior to General Accounting Office.

3. Copy of the letter of April 9, 1928, from attorneys to Department of Interior.

4. Answer to the same dated April 17, 1928.

5. Agreement of counsel of May 22, 1931.

6. Bond of the defendant, Globe Indemnity Company.

7. General contract between United States of America and Sanitation Corporation.

Plaintiff's request for findings of fact and conclusions of law.

Defendant's request for findings of fact and conclusions of law.

Opinion and findings of fact and law of Kirkpartrick, J.

Plaintiff's exceptions.

Assignments of error.

Petition for appeal and order thereon.

Yours very truly, S. W. Cooper, Atty. for Plffs.

G:D.

Clerk's certificate to foregoing transcript omitted in printing.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5025

UNITED STATES to Use of STEACY-SCHMIDT MFG. CO., INC., Appellant,

vs.

GLOBE INDEMNITY CO., Appellee

And afterwards, to wit, the 9th day of March, 1933, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and the Court, not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 10th day of July, 1933, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5025

THE UNITED STATES OF AMERICA to the Use of STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED, etc., Appellant,

vs.

GLOBE INDEMNITY CO., Appellee

Upon Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Woolley, and Thompson, Circuit Judges

OPINION—Filed July 10, 1933

THOMPSON, Circuit Judge:

This is an appeal from a judgment of the District Court for the Eastern District of Pennsylvania. The Sanitation

Corporation entered into a contract with the United States to furnish the latter with two needle valves required by the Department of the Interior for a public irrigation project. In accordance with the provisions of the Hurd Act (40 U. S. C. A. 270), the Sanitation Corporation, as principal, and the Globe Indemnity Corporation, as surety, executed a bond with the condition that the Sanitation Corporation pay promptly all persons supplying it with labor and materials. The Steacy-Schmidt Manufacturing Company, Inc., supplied the valves and all labor and materials necessary in the prosecution and completion of the Sanitation Corporation's contract with the United States. An involuntary petition in bankruptcy was filed against the Sanitation Corporation. The greater part of the sum due the Steacy-Schmidt Manufacturing Company, Inc., was still unpaid. On October 17, 1928, the Steacy-Schmidt Manufacturing Company, Inc., brought suit on the bond to its own use, in the name of the United States as legal plaintiff. Jury trial was waived by written stipulation and the case heard by the District Judge. This appeal is from the judgment in favor of one of the defendants, the Globe Indemnity Company.

The Hurd Act limits the subcontractor's right of action to one year. It provides:

"Any person or persons entering into a formal contract with the United States for * * * the prosecution and completion of any public work * * * shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; * * * If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall * * * be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and exe-

cuted, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bonds of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: * * *"

The plaintiff contends that final settlement did not take place until October 26, 1927, and that its right of action did not expire until October 26, 1928. The defendant contends that the date of final settlement was June 16, 1927, and that the right of action of the subcontractor expired June 16, 1928. It therefore is essential to determine the date of final settlement.

In Illinois Surety Co. v. Peeler, 240 U. S. 241, the Supreme Court held that final settlement, within the meaning of the Act, does not depend upon final payment but upon the final administrative determination by the proper authority of the amount due. In the instant case the defendant assumes that the Department of the Interior was the proper authority to make final settlement. It relies upon a letter dated June 16, 1927, written by the First Assistant Secretary of the Department of the Interior to the Claims Division, General Accounting Office, as proof that final settlement occurred on that day. The letter begins: "I am enclosing herewith for direct settlement the claim of the Sanitation Corporation", and concludes: "The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund 4 x 502."

Correspondence relative to the claim was enclosed for the consideration of the General Accounting Office which issued its certificate of settlement signed by the Comptroller General. The certificate read:

"I certify that I have examined and settled the claim of the Sanitation Corporation * * * and find that the sum of eight thousand eight hundred ninety-nine dollars is due from the United States to said claimant, payable from

the appropriation 4 x 502 * * * In view of the foregoing * * * it must be concluded that the claimant company is liable to the United States for liquidated damages for 163 calendar days delay at $25.00 per day. Issue warrant and send same as above."

The Comptroller General, in making his finding, relied upon the correspondence submitted by the Department of the Interior.

It may be conceded that, prior to the enactment of the Budget and Accounting Act of 1921, the Department of the Interior was the appropriate administrative branch to make final settlement for work done for that Department. The Budget and Accounting Act, however, unquestionably empowers the General Accounting Office to make all settlements on behalf of the government. The pertinent sections read:

"All powers and duties which on June 30, 1921, were conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department * * * shall * * * be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller shall be final and conclusive upon the executive branch of the Government. * * *" (31 U. S. C. A. 44.)

"All claims and demands whatever by the Government of the United States or against it * * * shall be settled and adjusted in the General Accounting Office." (31 U. S. C. A. 71.)

"Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant is issued in payment of an account certified as provided in this section and section 72 of this title.

* * * * * * *

"Disbursing officers, or the head of any executive department, * * * may apply for and the General Ac-

counting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern said office in passing upon the account containing said disbursement." (31 U. S. C. A. 74.)

This Act empowers the General Accounting Office to make all settlements and to render decisions upon any question involving a payment to be made by disbursing officers or by the head of any executive department. It provides that the balances certified by the Comptroller General shall be final and conclusive. The decision in Lambert Lumber Co. v. Jones Engineering & Construction Co., Inc., 47 F. (2d) 74, certiorari denied, 283 U. S. 842, sustains the view that the General Accounting Office is authorized to settle claims.

We are of the opinion that the General Accounting Office in the instant case was charged with the duty of making final settlement and performed that duty, as evidenced by its certificate of settlement issued in October, 1927. The plaintiff's suit therefore was brought within the one year allowed by the Hurd Act.

The judgment of the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

WOOLLEY, Circuit Judge, dissenting:

It should be noted that in the Lambert Lumber Company case the department charged with the work did not make an administrative determination of the claim but passed it on to the General Accounting Office which, doubtless, in that situation, had authority finally to act upon the matter. Distinguishing the dicta from the decision in the Lambert case and adhering to the law of the Peeler case, I believe the Budget and Accounting Act of 1921 did not repeal or change the provisions of the Hurd Act requiring an appropriate administrative determination of a claim before suit. I would find in this case that the Department of the Interior, having been charged with the work, made such a determination or settlement, and the action of the General Accounting Office was not a settlement of the contractor's claim but was merely an accounting transaction whereby

the Office, before directing payment, went over, examined, checked and audited the settlement previously made by the Department; that in this case the settlement so made by the Department was the one contemplated by the Hurd Act and that, in consequence, the plaintiff-contractor brought his suit too late.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5025

THE UNITED STATES OF AMERICA to the Use of STEACY-SCHMIDT MANUFACTURING CO., INC., etc., Appellant,

vs.

GLOBE INDEMNITY CO., Appellee

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, with costs, and the cause remanded for further proceedings in accordance with the opinion of this Court.

Philadelphia, July 10, 1933.

J. W. Thompson, Circuit Judge.

Endorsements: 5025. Order reversing judgment with costs, etc. Rec'd & filed July 10, 1933. Wm. P. Rowland, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct.:

I, Wm. P. Roland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of United States to use of Steacy-Schmidt Mfg. Co., Inc., Appellant, vs. Globe Indemnity Co., Appellee, No. 5025, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 28th day of July, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the United States the one hundred and fifty-eighth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals Third Circuit.)

[fol. 77] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1933

The peition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,022. U. S. Circuit Court of Appeals, Third Circuit. Term No. 419. Globe Indemnity Company, petitioner, vs. The United States of America to the use of Steacy-Schmidt Manufacturing Company, Incorporated. Petition for writ of certiorari and exhibit thereto. Filed September 1, 1933. No. 419, O. T., 1933.

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In the Supreme Court of the United States.

OCTOBER TERM, 1933. No.

Globe Indemnity Company, Petitioner,

v.

The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Globe Indemnity Company respectfully shows to your Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit on a bond given under the "Hurd Act" (Act of August 13, 1894, 28 Stat. at L. 278, Chap. 280, as amended by the Act of February 24, 1905, 33 Stat. at L. 811, Chap. 778, and the Act of March 3, 1911, 36 Stat. at L. 1167, Chap. 231, Sec. 291, 40 U. S. C. Sec. 270) which requires contractors for government construction to provide bonds conditioned upon the satisfactory performance of the construction contract and the payment of laborers and materialmen. The Bond (R. 25-29) is in the prescribed form and runs to the United States as obligee. The respondent is an unpaid materialman who brought this suit in the name of the United States and the petitioner is the surety upon the bond on which The Sanitation Corporation (the contractor) was the principal.

The Hurd Act provides:

> "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and material shall * * *

> have a right of action * * * provided that * * * it * * * shall be commenced within one year after the performance and final settlement of said contract, and not later."

The present suit was brought on October 17, 1928 (R. 1) and the defense was that because final settlement had occurred prior to October 17, 1927, the suit was not brought within one year after final settlement and was therefore brought too late (R. 10, 11).

There is no dispute as to any fact bearing upon the date of final settlement of the contract. The contract was for materials for use in the Umatilla (McKay Dam) irrigation project and was made for the United States by the Department of the Interior (R. 23-25).

By letter dated June 16, 1927, the First Assistant Secretary of the Department of the Interior forwarded the claim of The Sanitation Corporation, the contractor, to the General Accounting Office for direct settlement, in which letter he states "The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund-4X502" (R. 38).

On October 26, 1927, the General Accounting Office issued its formal certificate of settlement (R. 38-41) and the amount found due by the Department of the Interior was paid on November 5, 1927 (R. 41).

The question involved is whether "performance and final settlement" of the contract between The Sanitation Corporation and the United States took place on June 16, 1927, when the First Assistant Secretary of the Department of the Interior approved the claim and recommended payment or on October 26, 1927, when the General Accounting Office issued its certificate of settlement.

The United States District Court for the Eastern District of Pennsylvania, in an opinion by Kirkpatrick, *J.* (R. 54-61), held that performance and final settlement took place on June 16, 1927, and that this suit, which was commenced on October 17, 1928, was brought too late. The Circuit Court of Appeals for the Third Circuit reversed the judgment of the District Court and held (R. 72) that performance and final settlement took place on October 26, 1927, and that this suit was brought within one year from the date of performance and final settlement. Circuit Judge Woolley dissented from this view and concurred with the District Court (R. 74-75).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals of the Third Circuit held that performance and final settlement took place not on June 16, 1927, when the claim was examined and approved by the Administrative Department having charge of the work, but on October 26, 1927, when the General Accounting Office issued its certificate and that, therefore, the present suit had been commenced within one year after the performance and final settlement of the contract, as required by the "Hurd Act" (Act of August 13, 1894, as amended, 40 U. S. C. Sec. 270). The Circuit Court of Appeals for the Third Circuit in so holding has decided an important question of federal law in a way in conflict with the applicable decisions of this Honorable Court.

2. The Circuit Court of Appeals for the Third Circuit erroneously held that the date of performance and final settlement was determined by the date upon which proceedings under the Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71) took place. In so holding, the Circuit Court of Appeals for the Third Circuit created a conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit.

C.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 5025, October Term, 1932, The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated, *v.* Globe Indemnity Company, and that said judgment of the Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GLOBE INDEMNITY COMPANY,
By
FREDERIC L. BALLARD,
1035 Land Title Bldg.,
Philadelphia, Pa.,
Attorney for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1933. No.

Globe Indemnity Company, Petitioner,

v.

The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 54-61), filed July 15, 1932, is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 70-74), filed July 10, 1933, is not reported.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. at L. 938, 28 U. S. C. Section 347.

2. The date of the judgment to be reviewed, namely, the judgment of the Circuit Court of Appeals for the Third Circuit, is July 10, 1933.

3. This case involves the interpretation of the Act of Congress approved August 13, 1894, 28 Stat. at L. 278, Chap. 280, as amended, 40 U. S. C. Sec. 270, known as the "Hurd Act." Said statute allows persons supplying labor or material to contractors upon public buildings or works to bring suit upon the contractor's bond provided that such suit be commenced "within one year after the performance and final settlement of said contract, and not later."

4. The Circuit Court of Appeals for the Third Circuit held that performance and final settlement took place on the date on which the General Accounting Office issued its certificate and not upon the date upon which the Administrative Department having charge of the work approved

the work and the amount to be paid to the contractor.

5. The case is therefore one which prior to the Act of February 13, 1925, 43 Stat. at L. 938, would have been reviewable by your Honorable Court upon writ of error. *Illinois Surety Co.* v. *United States to the use of J. A. Peeler, et al,* 240 U. S. 214. The case is now reviewable by your Honorable Court upon writ of certiorari pursuant to Section 240a of the Judicial Code as aforesaid.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "A" in the petition for *certiorari* and in the interest of brevity the statement is not repeated at this point.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the date of performance and final settlement was the date upon which the General Accounting Office issued its certificate and not the date upon which the Department of the Interior approved the claim of the contractor for payment.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the date of performance and final settlement was determined by the proceedings taking place under the Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71).

4. The Circuit Court of Appeals for the Third Circuit erred in holding that the present suit was brought within one year after performance and final settlement of the contract.

V.

ARGUMENT.

POINT A. The decision below is contrary to and in conflict with the decision of this court in *Illinois Surety Company* v. *United States to the use of J. A. Peeler, et al,* 240 U. S. 214.

POINT B. The decision below is in conflict with *Consolidated Indemnity & Insurance Co.* v. *W. A. Smoot & Co., Inc.,* 57 F (2d) 995 (C. C. A. 4th, 1932), certiorari denied 287 U. S. 613.

Point A. The decision below is contrary to and in conflict with the decision of this court in Illinois Surety Company v. United States to the use of J. A. Peeler, et al, 240 U. S. 214.

In *Illinois Surety Company* v. *United States to the use of J. A. Peeler, et al,* 240 U. S. 214, (known as the Peeler case) it appears that the work under the contract was completed and on August 21, 1912, the Treasury Department, which was the Department in charge of the construction, "stated and determined the final balance" to be paid to the contractor. Payment was made on September 11, 1912, and suit was brought on March 4, 1913. Both of the courts below entered judgment in favor of the plaintiff and the surety brought the case to this court upon writ of error on the theory that performance and final settlement took place September 11, 1912, and consequently that the suit was brought within six months of the date of performance and final settlement and was therefore premature. This court held that performance and final settlement took place on August 21, 1912, the date on which the Treasury Department, which was the Department in charge of the construction of the building, stated and determined the final balance due to the contractor. Consequently, the suit was not brought within six months of per-

formance and final settlement and was not premature. At page 221, Mr. Justice Hughes said:

> "* * * it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting *the appropriate administrative determination* with respect to the amount due. We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained." (Italics ours.)

Applying this test to the case under consideration this court found that performance and final settlement took place on the date on which the Administrative Department having charge of the work approved the balance due to the contractor, saying, at page 222:

> "On August 21, 1912, the supervising architect having received the certificate of the chief

> of the technical division of the office that all work embraced in the contract had been satisfactorily completed, made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor, and that the proper voucher should be issued in favor of the contractor for the balance, to wit, $3,999.01. And, on the same date, this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the 'final settlement' of the contract within the meaning of the act."

In the *Peeler* case this court considered R. S. Sec. 236 (Comp. Stat. 1913, Sec. 368) which provided that "all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Treasury Department." In holding that performance and final settlement took place when the Administrative Officers having charge of the work approved the amount due the contractor, this court necessarily held that the date of performance and final settlement was not determined by proceedings under R. S., Sec. 236.

The Circut Court of Appeals for the Third Circuit in the present case relied upon the

Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71) which transfers the duty from the Treasury to the General Accounting Office, but otherwise is in substantially the same language as the previous statute (R. S. Sec. 236) which authorized the Treasury Department to settle and adjust claims by or against the United States. In other words, the majority of the court below sustained an argument which was necessarily rejected in the *Peeler* case.

Judge Woolley, dissenting in the court below, recognized that the decision was inconsistent with the decision of this court in the *Peeler* case, saying: "adhering to the law of the Peeler case, I believe the Budget and Accounting Act of 1921 did not repeal or change the provisions of the Hurd Act requiring an appropriate administrative determination of a claim before suit."

The facts of the present case are very different from those of *Lambert Lumber Co.* v. *Jones Engineering and Construction Company, Inc.*, 47 F (2d) 74, certiorari denied 283 U. S. 842. In that case the Administrative Department having charge of the work merely passed along to the General Accounting Office the function of making final settlement. There never was any administrative determination of the amount due

except in the General Accounting Office. This distinction has been recognized in other Circuits. See *Consolidated Indemnity & Insurance Company* v. *W. A. Smoot & Co., Inc.*, 57 F (2d) 995, 997 (C. C. A. 4th, 1932), certiorari denied 287 U. S. 613. In the present case, the administrative department itself determined the amount due.

Judge Woolley, in his dissenting opinion in the court below is careful to point out that the court should have followed the decision and not the dictum in the *Lambert* case because, while that decision is perfectly correct, the dictum is inconsistent with the decision of this court in the *Peeler* case.

Point B. The decision below is in conflict with Consolidated Indemnity & Insurance Co. v. W. A. Smoot & Co., Inc., 57 F (2d) 995 (C. C. A. 4th, 1932), certiorari denied 287 U. S. 613.

The judgment of the Circuit Court of Appeals for the Third Circuit, which this court is asked to review, has created a conflict between the Third and Fourth Circuits on the question involved in this case.

In *Consolidated Indemnity and Insurance Company* v. *W. A. Smoot & Co., Inc.*, 57 F (2d) 995 (C. C. A. 4th 1932), certiorari denied 287 U. S.

613, the contract involved the construction of barracks at Fort Humphreys, Virginia. On June 28, 1930, the constructing quartermaster reached an agreement with the contractor upon the balance due and prepared a voucher for that amount. It was argued that no final settlement had ever taken place because there was no evidence of a settlement in the General Accounting Office as required by the Budget and Accounting Act of 1921. The Circuit Court of Appeals for the Fourth Circuit held that performance and final settlement within the meaning of the Hurd Act took place on June 28, 1930, when the constructing quartermaster, who represented the Administrative Department having charge of the work, fixed the amount due the contractor and the court rejected the argument that final settlement, if it was to take place at all, must take place in accordance with the Budget and Accounting Act, saying, at page 997:

> It is argued that there was no showing that there had ever been a final settlement within the meaning of the Hurd Act because there was no evidence of a settlement in the general accounting office, as required by the Budget and Accounting Act of 1921. Act June 10, 1921, § 305 (31 USCA § 71). We are not impressed by this argument. Undoubtedly, where the Comptroller General

actually makes the administrative determination of the amount due, as in Lambert Lumber Co. *v.* Jones Engineering & Construction Co. (C. C. A. 8th) 47 F, (2d) 74, his determination is the settlement within the meaning of the act. But in other cases laborers and materialmen are not to be delayed in the assertion of their claims against bonds of public contractors until the Comptroller General's office shall have completed the auditing of the accounts of the disbursing officers. We think that, when the government official charged with responsibility in the premises officially determines the balance due to or from the contractor and makes a record of such determination, this is a final settlement within the meaning of the Hurd Act, notwithstanding that the accounts of disbursing officers are subject to audit in the Comptroller General's office. Just as the fact that the right to sue on the bond is not delayed by the contingency that the determination of the officer may not be approved by the courts (Ill. Surety Co. *v.* United States, 240 U. S. 214, 221, 36 S. Ct. 321, 60 L. Ed. 609), so it is not to be delayed by the contingency that such determination may not be approved by the Comptroller General's Office in its auditing of the accounts. We regard the decision in Illinois Surety Co. *v.* United States, *supra,* as determinative of the matter. While it is

true that that case was decided before the passage of the Budget Act of 1921, accounts at that time were subject to revision in the Treasury Department under a statute of a wording very similar to that upon which the surety company relies. Rev. St. § 236."

It is clear, therefore, that the Circuit Court of Appeals for the Third Circuit, in the decision below, has made the date of performance and final settlement turn on what takes place in the General Accounting Office under the Budget and Accounting Act. In so doing, it not only failed to follow the decision of this court in the *Peeler* case but has placed itself out of harmony with other Circuits which, as far as we have been able to determine, have followed, without exception, the rule laid down by this court in the *Peeler* case almost 20 years ago.* Indeed, until

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* *U. S. F. & G. Co. v. McNulty Bros. Inc., et al,* 13 F (2d) 78 (C. C. A. 1st, 1926).

Robinson, et al v. U. S. to use of Brown, Ketcham Iron Works, et al, 251 F 461 (C. C. A. 2nd, 1918).

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U. S. F. & G. Co. v. U. S. to use of Smoot, 298 F 365 (Court of Appeals of D. C., 1924).

the decision of the present case the Circuit Court of Appeals for the Third Circuit has conformed to the decision of this court in the *Peeler* case.*

Respectfully submitted,

ROBERT BRIGHAM,
MORRIS CHESTON,
FREDERIC L. BALLARD.

BALLARD, SPAHR, ANDREWS & INGERSOLL,
Of Counsel.

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* *American Bonding Co. et al* v. *United States to the use of Francini, et al*, 233 F 364 (1916).
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 419.

Globe Indemnity Company, Petitioner,

v.

The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated.

BRIEF OF PETITIONER.

I. THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 40 to 45) filed July 15, 1932, is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 52 to 56) and the dissenting opinion of Woolley, *Cir. J.* (R. 56), both filed July 10, 1933, are reported in 66 F. (2d) 302-304 (Advance Sheets of October 9, 1933).

II. STATEMENT OF THE CASE.

This is a suit on a bond given under the "Hurd Act" (Act of August 13, 1894, 28 Stat. at L. 278, Chap. 280, as amended by the Act of February 24, 1905, 33 Stat. at L. 811, Chap. 778, and the Act of March 3, 1911, 36 Stat. at L. 1167, Chap. 231, Sec. 291, 40 U. S. C. Sec. 270) which requires contractors for government construction to provide bonds conditioned upon the satisfactory performance of the construction contract and the payment of laborers and materialmen. The bond (R. 19) is in the prescribed form and runs to the United States as obligee. The respondent is an unpaid materialman who brought this suit in the name of the United States and the petitioner is the surety upon the bond on which The Sanitation Corporation (the contractor) was the principal.

The Hurd Act provides:*

> "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and material shall * * * have a right of action * * * provided that * * * it * * * shall be commenced within one year after the performance and final settlement of said contract, and not later."

The present suit was brought on October 17, 1928 (R. 1) and the defense was that because perform-

*The act is reprinted in full in the appendix to this brief at page 51.

ance and final settlement had occurred prior to October 17, 1927, the suit was not brought within one year and was therefore brought too late (R. 7, 8).

There is no dispute as to any fact bearing upon the date of performance and final settlement of the contract. The contract was for materials for use in the Umatilla (McKay Dam) irrigation project and was made for the United States by the Department of the Interior (R. 17, 18), under the Reclamation Act of 1902 (Act of June 17, 1902, 32 Stat. at L. 388, 43 U. S. C. Secs. 391 and 419).

By letter dated June 16, 1927, the First Assistant Secretary of the Department of the Interior forwarded the claim of The Sanitation Corporation, the contractor, to the General Accounting Office for direct settlement, in which letter he states "The claim has received administrative examination, is approved for $8,889.30 and I recommend that the amount found due be paid from the Reclamation Fund-4X502" (R. 28).

On October 26, 1927, the General Accounting Office issued its formal certificate of settlement (R. 28-30) and the amount found due by the Department of the Interior was paid on November 5, 1927 (R. 30).

The question involved is whether "performance and final settlement" of the contract between The Sanitation Corporation and the United States took place on June 16, 1927, when the First Assistant Secretary of the Department of the Interior approved the claim in a specified amount, or on October

26, 1927, when the General Accounting Office issued its certificate of settlement in that same amount.

The United States District Court for the Eastern District of Pennsylvania, in an opinion by Kirkpatrick, *J.* (R. 40-45), held that performance and final settlement took place on June 16, 1927, and that this suit, which was commenced on October 17, 1928, was brought too late.

The Circuit Court of Appeals for the Third Circuit reversed the judgment of the District Court and held (R. 56) that performance and final settlement took place on October 26, 1927, and that this suit was therefore brought within one year from the date of performance and final settlement.

The opinion of the Circuit Court proceeds on the theory that the Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71) required that the date of performance and final settlement must be determined by the action of the General Accounting Office and not by the action of the Department of the Interior, the department having administrative charge of the work covered by the contract.

Circuit Judge Woolley dissented from this view and concurred with the District Court (R. 56). In his opinion the Budget and Accounting Act of 1921 did not repeal or change the provisions of the Hurd Act under which, as construed by this Court, subcontractors' suits must be brought within a year from the performance and final settlement of the

contract, as evidenced by an administrative determination made by the department having supervision of the work.

III. SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the date of performance and final settlement was the date upon which the General Accounting Office issued its certificate and not the date upon which the Department of the Interior approved the claim of the contractor for payment.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the date of performance and final settlement was determined by the proceedings taking place under the Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71).*

4. The Circuit Court of Appeals for the Third Circuit erred in holding that the present suit was brought within one year after performance and final settlement of the contract.

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*The relevant provisions of this statute are reprinted in the appendix to this brief at pages 38 to 43.

IV. ARGUMENT.

Summary.

A. THE HURD ACT CONTEMPLATES AN ENGINEERING RATHER THAN A MERE FISCAL DETERMINATION OF THE DATE OF "PERFORMANCE AND FINAL SETTLEMENT."

1. This court so held in *Illinois Surety Co.* v. *United States to use of J. A. Peeler,* 240 U. S. 214.

2. Reason for the rule:

When the department having charge of the work records its decision that a contractor has performed the contract, the bond should be made available for materialmen without delay caused by accounting routine.

B. THE BUDGET AND ACCOUNTING ACT OF 1921 DID NOT SO CHANGE THE PRIOR LAW AS TO REQUIRE THE DATE OF "PERFORMANCE AND FINAL SETTLEMENT" TO BE DETERMINED BY THE GENERAL ACCOUNTING OFFICE INSTEAD OF THE INTERIOR DEPARTMENT.

1. *Lambert Lumber Co.* v. *Jones Engineering & Construction Co. Inc.,* 47 F. (2d) 74, Certiorari denied 283 U. S. 842, does not hold that the Budget and Accounting Act of 1921 changed the prior law.

2. To require a determination by the General Accounting Office would unduly delay subcontractors without any advantage to the United States.

3. The General Accounting Office is not able to make an engineering determination that the contractor has performed the contract.

4. The Budget and Accounting Act of 1921 is in language almost identical to the previous statutes and therefore did not change the prior law.

5. *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co.*, 57 F. (2d) 995, Certiorari denied 287 U. S. 613, held that the Budget and Accounting Act of 1921 did not change the prior law.

6. Both under the prior law and under the Budget and Accounting Act of 1921 the lower courts have held that the date of "performance and final settlement" might be determined by departments other than the Treasury or the General Accounting Office.

7. Congress has conferred upon the Secretary of the Interior the most complete authority over all matters relating to reclamation projects. This necessarily includes the power to determine the date of "performance and final settlement."

C. THE INTERIOR DEPARTMENT IN THE PRESENT CASE ACTUALLY DETERMINED THE DATE OF "PERFORMANCE AND FINAL SETTLEMENT."

1. It did not merely pass this function to the General Accounting Office as was the case in *Lambert Lumber Co.* v. *Jones Engineering & Construction Co., Inc.*, 47 F. (2d) 74.

A. The Hurd Act contemplates an engineering rather than a mere fiscal determination of the date of "performance and final settlement."

In *Illinois Surety Co.* v. *United States to the use of J. A. Peeler*, 240 U. S. 214, it appeared that although the work in question was a post office building the construction was under the charge of the Secretary of the Treasury and under the general supervision of the supervising architect (240 U. S. at 221). Suit was brought by an unpaid subcontractor on March 4, 1913, and after an amendment in the pleadings the surety defended on the ground that the suit was premature in that it had been brought within six months of the date of performance and final settlement. It further appeared, however, that on August 21, 1912, the supervising architect reported to the Secretary that all the work had been satisfactorily completed and on the same day the recommendation of the supervising architect that a voucher in a fixed amount be drawn was approved by direction of the Secretary of the Treasury. This date, instead of the date upon which the voucher was actually drawn, was held to be the date of performance and final settlement, and accordingly the suit of the subcontractor was not premature.

The opinion of the Court, which was delivered by Mr. Justice Hughes, points out that the Hurd Act, in its original form, was defective in that it did not give the United States an adequate opportunity to enforce its demands against the contractor's surety

nor did it adequately provide for priority of the claim of the United States upon the bond. Accordingly, the Hurd Act was amended in 1905 to remedy these defects. Obviously the policy of the amended statute is to allow subcontractors to bring suit as promptly as possible after the United States has determined that it will have no claim upon the bond. In stating the purpose of the amendment of 1905 and its effect, Mr. Justice Hughes, in the *Peeler* case (240 U. S. at 218) said:

> "With this object in view,—to protect the priority of the United States, and at the same time to give a remedy to materialmen and laborers on the contractor's bond and a reasonable time to prosecute it (United States use of Alexander Bryant Co. *v.* New York Steam Fitting Co., 235 U. S. 327, 337, 59 L. ed. 253, 257, 35 Sup. Ct. Rep. 108),—it was natural that the time allowed exclusively for action by the government should begin to run when the contract had been completed, and the government, in its final adjustment and settlement according to established administrative methods, had determined what amount, if any was due. Then the government would have ascertained the amount of its claim, if it had one, and could bring suit if it desired. As such determinations are regularly made in the course of administration, nothing would seem to be gained by postponing the date, from which to reckon the six months, to the time of payment."

The nature of this determination is clearly stated at page 221:

> "* * * it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting *the appropriate administrative determination* with respect to the amount due. We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained." (Italics ours.)

That the *appropriate administrative determination* is to be made by the department having charge of the work rather than by the department having charge of government accounting is made clear at pages 221 and 222:

> "In the present case, *the construction of the building was in charge of the Secretary of the Treasury* and under the general supervision of the supervising architect. The Secretary of the Treasury was authorized to remit the whole or any part of the stipulated liquidated damages as in his discretion might be just and equitable. Act of June 6, 1902, 32 Stat. at L. 326, chap. 1036, Comp. Stat. 1913, §6922. On August 21,

> 1912, the supervising architect having received the certificate of the chief of the technical division of the office that all work embraced in the contract had been satisfactorily completed, made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor, and that the proper voucher should be issued in favor of the contractor for the balance, to wit, $3,999.01. And, on the same date, this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the 'final settlement' of the contract within the meaning of the act." (Italics ours.)

We submit, therefore, that this court clearly had in mind an engineering rather than a mere fiscal or accounting determination. Hence the determination is to be made by the department in charge of the construction, for it is the only department that can properly determine the *"performance"* of its own contract.

It is possible to inject some confusion into the situation owing to the coincidence that in the *Peeler* case the department having charge of the construction happened to be the same department in which the accounting and fiscal business of the Government was carried on. This coincidence, however, should not be allowed to obscure what we submit to have been the very foundation of the decision. In the *Peeler* case the supervising architect reported that

the contract had been fully performed. On the same day his report was approved by the Secretary of the Treasury. That was the date of performance and final settlement. It was a date fixed as a result of an engineering determination. The fiscal or accounting determination would, at the time the *Peeler* case was decided, have been made by the Auditor of the Treasury under the provisions of Sections 7 and 8 of the Act of July 31, 1894, 28 Stat. at L. 206, subject to an appeal to the Comptroller of the Treasury under Section 8 (28 Stat. at L. 207).* In affirming the judgment and holding that the date of performance and final settlement had been determined by the Secretary of the Treasury, we submit that this Court has necessarily held that the *appropriate administrative determination,* referred to in the opinion, is an engineering and not a mere fiscal or accounting determination.

The lower federal courts have so understood the opinion of this court in the *Peeler* case. They have held performance and final settlement might take place although the amount due the contractor was subject to change or a portion thereof was retained. *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co.*, 57 F. (2d) 995 (C. C. A. 4th, 1932), Certiorari denied 287 U. S. 613; *United States to Use of Stallings* v. *Starr,* 20 F. (2d) 803 (C. C. A. 4th, 1927); *Antrim Lumber Co.* v. *Hannan,* 18 F. (2d) 548 (C. C. A. 8th, 1927); *United States to Use of*

*The relevant provisions of Sections 7 and 8 of this statute are reprinted in the appendix to this brief at pages 46 to 48.

Wennemer Const. Co., Inc. v. *Arnold,* 268 Fed. 130 (D. C. Conn. 1920); *United States for Use of R. Haas Electric & Mfg. Co.* v. *Title Guaranty & Surety Co.,* 254 Fed. 958 (C. C. A. 7th, 1918); *Robinson* v. *United States to the use of Brown-Ketcham Iron Works,* 251 Fed. 461 (C. C. A. 2nd, (1918); *United States ex rel Brown-Ketcham Iron Works* v. *Robinson,* 214 Fed. 38 (C. C. A. 2nd, 1914). Obviously, the important thing for the purpose of suits under the Hurd Act is the date on which the department having charge of the work determines that it has been performed and the Government will have no claim upon the bond and not the date on which minor disputes or matters of accounting routine are disposed of.

This rule is based upon sound reason. The Hurd Act provides for a bond which is to serve a dual purpose in that it is to protect not only the United States but also the subcontractors. In its latter aspect the Hurd Act has been held by this Court to be highly remedial and it is construed liberally in order to protect persons who furnish labor or materials to Government contractors (*Brogan* v. *National Surety Co.,* 246 U. S. 257, 262). Such persons cannot sue until the expiration of six months from the date of both "performance and final settlement" of the principal contract. To give the Hurd Act the effect which Congress intended it to have, the bond should be made available to subcontractors at the earliest possible date consistent with reasonable protection

to the United States. When the department having charge of the work records its engineering determination that the Government will have no claim upon the bond, that obligation should be made available to subcontractors without further delay than the six months period during which the United States alone can bring suit. As this Court said in the *Peeler* case, nothing is gained by postponing the date to the time of payment. It is equally true that nothing is to be gained by postponing the date to the time when the acounting officers (four months later in this case) did an act which is merely a preliminary to payment and not a prerequisite to a determination by the Government that it will have no claim upon the bond. This thought was well expressed by the Circuit Court of Appeals of the Second Circuit in *Robinson* v. *United States to the use of Brown-Ketcham Iron Works*, 251 Fed. 461, 465 (C. C. A. 2nd, 1918):

> "The limitation of time in the statute was intended for the benefit of the United States, and as soon as the rights of the United States on the bond were out of the way the subcontractors had the right to sue, assuming, of course, that their own contracts gave them rights against the main contractor. Illinois Surety Co. *v.* Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609. In other words, when it appears that the United States, through its proper officials, has indicated a determination not to sue on the bond by final settlement, and six months have elapsed, then the

security becomes open to those who have trusted to the credit of the main contractor.

"It appears from the letter of the supervising architect that final settlement was approved by the Secretary of the Treasury under date of February 10, 1909. It is true that a part of the contract price was reserved for the completion of certain unfinished work, but enough had been completed to satisfy the United States that a final settlement could be made, and such final settlement was in fact made, and if it should later appear that the United States, acting through its officials, was wrong in that regard, it was the United States and none other which took the risk that by intermediate recoveries the subcontractors might so deplete the fund that the United States would bear the loss, if any, if it erred in approving the contract as finally settled. The word 'completion,' in view of the purposes of the statute, and the attitude of the courts in giving those purposes effect, must be construed as meaning *that the contract was completed in the sense that the United States was satisfied that enough had been done to discharge the surety as to the United States.* Any other construction would inevitably lead to the defeat of some of the essential purposes for which the statute was enacted. A subcontractor who had performed his work would be compelled to wait for some indefinite period because some other subcontractor, or the main contractor himself by reason of some default or dispute, made necessary the reservation of a certain sum to make good that default or dispose of that dispute. It can readily be seen

that in a contract involving, as did the contract at bar, over a million dollars, a subcontractor could be kept out of his money because of a dispute over a comparatively small sum, notwithstanding the fact that the government was satisfied to the point where it no longer looked to the surety bonds. Remembering that the purpose of the statute in this regard was to protect the United States, it follows that there is no merit in the contention that the subcontractor must wait to begin his action until disputes as to completion are finally settled, notwithstanding that the government on its part is entirely satisfied and approves the final settlement of the contract." (Italics ours.)

In order to give effect to the intention of Congress to provide a bond to protect not only the United States but also to protect subcontractors, we submit that it is necessary to hold, as this Court did in the *Peeler* case, that the date of performance and final settlement is that day upon which the department having charge of construction records its decision that the government is satisfied with the work and not the day on which the Accountng Officers audit this determination. To require subcontractors to wait the completion of accounting routine is, we submit, to defeat some of the essential purposes for which the statute was enacted without any advantage whatever to the Government.

The court below conceded (R. 55) that prior to the enactment of the Budget and Accounting Act of

1921 the department having charge of the construction, in this case the Department of the Interior, was the appropriate department to fix the date of performance and final settlement. But it held that the Budget and Accounting Act of 1921 had changed the law and that this function was now lodged exclusively in the General Accounting Office.* It was on this point that Judge Woolley dissented in the court below (R. 56).

B. The Budget and Accounting Act of 1921 did not so change the prior law as to require the date of "performance and final settlement" to be determined by the General Accounting Office instead of the Interior Department.

The court below has held that subsequent to the Budget and Accounting Act of 1921, the date of performance and final settlement cannot be fixed by the department having charge of the work but must be fixed exclusively by the General Accounting Office. For that conclusion the court below relies upon *Lambert Lumber Co.* v. *Jones Engineering & Construction Co., Inc.*, 47 F. (2d) 74 (C. C. A. 8th, 1931), Certiorari denied 283 U. S. 842.

A reading of Judge Kenyon's opinion in that case creates the impression that he is not in sympathy with the rule of the *Peeler* case and leads one to

*The lower federal courts in numerous cases, both before and after the Budget and Accounting Act of 1921, have held that departments other than the Treasury or the General Accounting Office had power to determine the date of performance and final settlement. The cases are collected on pages 26 to 28 *infra* of this brief.

believe that he would like to change that rule and have the date of completion and final settlement determined in every case by proceedings in the General Accounting Office. He did not, however, so decide. It appeared that the Veterans' Bureau, which had charge of the work, instead of determining that the contractor had fully performed, passed along to the General Accounting Office the task of making that determination.* Accordingly, Judge Kenyon did not decide whether the Veterans' Bureau was deprived by the Budget and Accounting Act of power to make such a determination. He found such a decision unnecessary, saying, at page 78:

> "The broader question whether any final settlement of a claim or demand against the government, except where there is specific authority from the Congress, can now, in view of the Act of June 10, 1921, be settled and adjusted except in the General Accounting Office, is not necessary to be determined."

Cases of this kind therefore have no bearing whatever upon the present case. The most that can be said of them is that they decide that the General Accounting Office has power to determine the date of peformance and final settlement where that determination has not been made by the department having charge of the construction. They do not

*This point is brought out more fully in our discussion of *Lambert Lumber Co. v. Jones Engineering & Construction Co., Inc.*, 47 F. (2d) 74 (C. C. A. 8th, 1931), Certiorari denied 283 U. S. 842, at page 34 of this brief, *infra*.

decide that such power now resides exclusively in the General Accounting Office.

Indeed, it would be somewhat surprising if Congress had intended to make the jurisdiction of the General Accounting Office in this respect exclusive. Congress intends subcontractors to have a right to sue upon the bond. Congress, presumably intends this right to accrue at the earliest possible moment consistent with the reasonable protection of the United States. To hold that the subcontractors must wait until the matter has been determined by the General Accounting Office not only subjects the subcontractors to considerable delay (in this case a delay of over four months) but also requires the General Accounting Office to determine questions for which it is by no means qualified, and leads to no advantage to the United States.

How can the General Accounting Office determine, for example, that a battleship has been fully constructed in accordance with the plans and specifications? This is obviously an engineering determination to be made in the Navy Department and when it has been made by that Department the bond should be made available for subcontractors without waiting for the purely accounting and fiscal routine which is to be performed by the General Accounting Office. If the Navy Department has made a mistake the United States is nevertheless amply protected inasmuch as no subcontractor can start a suit until six months have elapsed, during which period the

United States alone may bring suit upon the bond. Moreover, the United States may sue on the bond even though more than a year has elapsed since performance and final settlement. See *United States v. Marshall*, 225 Fed. 687 (S. D. N. Y. 1914), affirmed 225 Fed. 760 (C. C. A. 2nd, 1915), and *Antrim Lumber Co. v. Hannan*, 18 F. (2d) 548 (C. C. A. 8th, 1927).

That Congress did not intend the Budget and Accounting Act of 1921* to change the prior law, becomes obvious when we compare that statute with the provisions of the statutes which, prior to the enactment of the Budget and Accounting Act, regulated the fiscal and accounting operations of the Government.† These old and new statutes are substantially identical and the only effect of the Budget and Accounting Act, as applied to the present case, was to transfer to the General Accounting Office a function which had hitherto been lodged in the Treasury Department. The nature of the function was left unchanged.

The Circuit Court of Appeals in the present case first cites (R. 55) the provisions of Sec. 304 of the Budget and Accounting Act of 1921 (31 U. S. C. Sec. 44), the relevant parts of which are as follows:

"'All powers and duties which on June 30, 1921, were conferred or imposed by law upon the

* The relevant provisions of the Budget and Accounting Act are reprinted in the appendix to this brief at pages 38 to 43.

† The relevant provisions of the statutes in force prior to the Budget and Accounting Act are reprinted in the appendix to this brief at pages 44 to 50.

> Comptroller of the Treasury or the six auditors of the Treasury Department * * * shall * * * be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. * * *.'"

The last sentence of the above quotation is not, however, substantially different in effect from the language of Sec. 8 of the Act of July 31, 1894, 28 Stat. at L. 207, which provided:

> "The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided*, that the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account."

The court below next relies (R. 55) upon the provisions of Section 305 of the Budget and Accounting Act of 1921 (31 U. S. C. Sec. 71), which are as follows:

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

This is simply an amendment of R. S. Sec. 236, which was in the following language:

> "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

The court below next cites (R. 55) the following provisions found in 31 U. S. C. §74:

> "'Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant is issued in payment of an account certified as provided in this section and section 72 of this title. * * *
>
> "'Disbursing Officers, or the head of any executive department, * * * may apply for and

> the General Accounting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern said office in passing upon the account containing said disbursement.' "

The Circuit Court apparently thought that this language was a new provision made effective by the Budget and Accounting Act and was thus support for its conclusion that that act changed the law of the *Peeler* case.

This language, however, is not found in the Budget and Accounting Act of 1921 and it is not new. It was originally contained in Section 8 of the Act of July 31, 1894, c. 174, 28 Stat. at L. 207.* The compilers of the United States Code have merely altered the language of the Act of 1894 by substituting the words "General Accounting Office" for "Comptroller of the Treasury" or "Auditor," in order to make the terminology of the Act of 1894 conform to the scheme of the Budget and Accounting Act of 1921. Thus this provision was in effect when the *Peeler* rule was announced and during all the subsequent years in which it has been followed. It cannot be relied on to change that rule.

It is obvious, therefore, that there is nothing in the Budget and Accounting Act which so changed the law as to make it impossible for the department hav-

*The provisions of this section are reprinted in the appendix to this brief at pages 46 to 48.

ing charge of the construction to determine the date of performance and final settlement for the purpose of suits by subcontractors under the Hurd Act. We submit that Judge Woolley, dissenting in the court below, was clearly right when he said (R. 56) that the Budget and Accounting Act of 1921 had not changed the prior law.

Judge Woolley's conclusion is borne out by the decision in *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co.*, 57 F. (2d) 995 (C. C. A. 4th, 1932), Certiorari denied 287 U. S. 613, in which the Circuit Court said, at page 997:

> "It is argued that there was no showing that there had ever been a final settlement within the meaning of the Hurd Act because there was no evidence of a settlement in the general accounting office, as required by the Budget and Accounting Act of 1921. Act June 10, 1921, §305 (31 USCA §71). We are not impressed by this argument. Undoubtedly, where the Comptroller General actually makes the administrative determination of the amount due, as in Lambert Lumber Co. *v.* Jones Engineering & Construction Co, (C. C. A. 8th) 47 F. (2d) 74, his determination is the settlement within the meaning of the act. But in other cases laborers and materialmen are not to be delayed in the assertion of their claims against bonds of public contractors until the Comptroller General's office shall have completed the auditing of the accounts of the disbursing officers. We think that, when the government official charged with responsibility in the premises

officially determines the balance due to or from the contractor and makes a record of such determination, this is a final settlement within the meaning of the Hurd Act, notwithstanding that the accounts of disbursing officers are subject to audit in the Comptroller General's office. Just as the fact that the right to sue on the bond is not delayed by the contingency that the determination of the officer may not be approved by the courts (Ill. Surety Co. *v.* United States, 240 U. S. 214, 221, 36 S. Ct. 321, 60 L. Ed. 609), so it is not to be delayed by the contingency that such determination may not be approved by the Comptroller General's Office in its auditing of the accounts. We regard the decision in Illinois Surety Co. *v.* United States, *supra*, as determinative of the matter. While it is true that that case was decided before the passage of the Budget Act of 1921, accounts at that time were subject to revision in the Treasury Department under a statute of a wording very similar to that upon which the surety company relies. Rev. St. §236."

Respondent will doubtless endeavor to distinguish the *Smoot* case on the ground that there was no submission to the General Accounting Office at all. This attempted distinction merely emphasizes the true points decided in that case, namely: (1) That it is not necessary to have the date of performance and final settlement determined by the General Accounting Office and consequently the materialman need not allege that there had been a submission to that office; (2) That the War Department had power to deter-

mine, and did determine, the date of performance and final settlement; and (3) That this determination by the War Department fixes the time for bringing suits under the Hurd Act, notwithstanding what might or might not take place thereafter in the General Accounting Office. If the materialman had awaited the action of that office, it might very well have been too late for him to bring suit within the period required by the Hurd Act.

Prior to the effective date of the Budget and Accounting Act of 1921, the lower federal courts very frequently recognized and gave effect to determinations of the date of the performance and final settlement by departments other than the Treasury Department, which at that time exercised the very same functions now lodged in the General Accounting Office. For example, in the following cases the date of performance and final settlement was determined by the Navy Department: *Stitzer* v. *United States to use of Vaughan,* 182 Fed. 513 (C. C. A. 3d, 1910); *United States to Use of Wennemer Const. Co., Inc.* v. *Arnold,* 268 Fed. 130 (D. C. Conn. 1920); *United States Fidelity & Guaranty Co.* v. *United States to Use of Smoot,* 298 Fed. 365 (Ct. of App. D. C. 1924); *United States for Use of R. Haas Electric & Mfg. Co.* v. *Title Guaranty & Surety Co.,* 254 Fed. 958 (C. C. A. 7th, 1918); *Mandel* v. *United States to Use of Wharton & N. R. Co.,* 4 F. (2d) 629 (C. C. A. 3d, 1925), Certiorari denied 268 U. S. 698; *United States to Use of Crellin* v. *George F. Pawling & Co.,* 297 Fed. 65

(C. C. A. 3d, 1924); *United States Fidelity & Guaranty Co.* v. *McNulty Bros., Inc.*, 13 F. (2d) 78 (C. C. A. 1st, 1926). In the following cases the determination was made by the War Department: *United States to Use of Union Gas Engine Co.* v. *Newport Shipbuilding Corporation, Limited*, 18 F. (2d) 556 (C. C. A. 4th, 1927); *Pederson* v. *United States for the Use of Washington Iron Works*, 253 Fed. 622 (C. C. A. 9th, 1918). And in *Antrim Lumber Co.* v. *Hannan*, 18 F. (2d) 548 (C. C. A. 8th, 1927), the determination was made by the Department of the Interior. While many of these cases were decided subsequent to 1921, in each of them it appeared that the work had been done and the date of performance and final settlement had been determined prior to the effective date of the Budget and Accounting Act of 1921.

Since the enactment of that statute it might be expected that the courts would continue to apply the same rule, because the Budget and Accounting Act of 1921 simply transferred to the General Accounting Office functions which had hitherto been performed by the Department of the Treasury, without making substantial changes in those functions. The few cases which have arisen since 1921 show that the Circuit Courts of Appeal, with the exception of the court below in the present case, have not departed from the previously established rule which contemplated that the date of performance and final settlement could be determined as an engineering rather than

an accounting matter. For example, it has been held that the date of performance and final settlement might be determined in the War Department: *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co., Inc.*, 57 F. (2d) 995 (C. C. A. 4th, 1932), Certiorari denied 287 U. S. 613; *United States to Use of Stallings* v. *Starr*, 20 F. (2d) 803 (C. C. A. 4th, 1927); and in two recent cases the Department of Agriculture was held to have this power: *Southern Surety Co.* v. *Western Pipe & Steel Co.*, 16 F. (2d) 456 (C. C. A. 9th, 1926); *United States Fidelity & Guaranty Co.* v. *United States to use of Price*, 65 F. (2d) 639 (C. C. A. 9th, 1932).

These decisions holding that some department other than the Treasury or the General Accounting Office actually did fix the date of performance and final settlement necessarily decide that such department (1) had authority to make that determination and (2) actually did make it.

Respondent will no doubt contend that the present case is the first one in which there were two documents which could be construed as determining the date of performance and final settlement; that there cannot be two such determinations; and that since the Budget and Accounting Act of 1921 gives the General Accounting Office power to settle all claims against the United States the certificate of that department must, for the purposes of this suit, be considered the official determination.

It is our position that although the General Ac-

counting Office may have power to determine the date of performance and final settlement in cases where such determination has not been made by the department having charge of the work [see for example *Lambert Lumber Co.* v. *Jones Engineering & Construction Co., Inc.*, 47 F. (2d) 74 (C. C. A. 8th, 1931), Certiorari denied 283 U. S. 849], in any case in which that department does determine the date of performance and final settlement, such determination governs the time in which suits can be brought under the Hurd Act and this we submit to be true regardless of what may thereafter take place in the General Accounting Office. That the Secretary of the Interior had power in the present case to determine the date of performance and final settlement is made clear by the broad powers conferred by Congress upon him with respect to the very contract now under consideration. This contract was made by the Secretary under the provisions of the Reclamation Act of June 17, 1902, 32 Stat. at L. 388 and its amendments and supplements. Section 2 of that act (43 U. S. C. Sec. 411) provides:

> "That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct * * * irrigation works for the storage, diversion, and development of waters * * *."

Section 4 of the same statute (43 U. S. C. Sec. 419) provides:

> "That upon the determination by the Secretary of the Interior that any irrigation project is

practicable, he may cause to be let contracts for the construction of the same * * *."

The general authority of the Secretary was set forth in Section 10, the language of which is now found in 43 U. S. C. Sec. 373:

> "That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

By these statutory provisions Congress clearly intended to confer on the Secretary of the Interior complete supervision over the construction of reclamation projects. One of the most important and obvious functions committeed to the Secretary is the power to determine whether or not the contractor has fully performed his contract. When the Secretary has determined that the contractor has performed and has evidenced this determination by approving the amount due the contractor, we submit that the Secretary has at the same time determined the date of performance and final settlement for the purposes of the Hurd Act, regardless of any subsequent action in the General Accounting Office.

The argument to the contrary wholly overlooks the purpose of the Hurd Act, which was to give protection to subcontractors and give it promptly. It overlooks the basis upon which the *Peeler* case is

founded, namely, that as soon as the department in charge of the construction has determined, from an engineering standpoint, that the Government will have no claim upon the bond, that obligation should be made available to subcontractors. It overlooks the considerations which make such a determination peculiarly appropriate to the department under whose supervision the work is done, and peculiarly inappropriate to the General Accounting Office. It treats this case as though it involved a claim against the United States rather than a claim by an unpaid subcontractor suing, in the name of the United States, the surety on a statutory obligation.

We submit, therefore, that the Department of the Interior had power to determine the date of performance and final settlement for the purposes of the Hurd Act; that this function was not placed by the Budget and Accounting Act of 1921 in the exclusive jurisdiction of the General Accounting Office; and that the determination of the Department of the Interior is controlling even though the General Accounting Office four months later issued a certificate as a part of its fiscal duties.

C. The Interior Department in the present case actually determined the date of "performance and final settlement."

The District Court found that the date of performance and final settlement was June 16, 1927, on which date the First Assistant Secretary of the Department

of the Interior forwarded the claim of The Sanitation Corporation, the contractor, to the General Accounting Office. The Secretary's letter, written on that date, commences with the statement (R. 24):

> "I am enclosing herewith for direct settlement claim of the Sanitation Corporation of New York City."

Obviously, the phrase "direct settlement" is used in this sentence to mean direct payment. The letter then reviews in detail the facts of the matter, certifying to the "complete delivery of the valves," on a certain date and enclosing the full file of correspondence, including the recommendations of the Chief Engineer. The letter concludes with the following two sentences (R. 28):

> "As shown by the correspondence no extension is recommended by the engineer whose determinations, in accordance with the provisions of paragraph 11 of the specifications governing the allowance of extensions of time, 'shall be final and conclusive.'
>
> "The claim has received administrative examination, *is approved* for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund—4 x 502." (Italics ours.)

Note that the Secretary refers to the recommendations of his Chief Engineer and points out the provision of the contract that they "shall be final and

conclusive." Following this, note his categorical statement that the claim "has received administrative examination, is approved for $8,899.30." The word "approved" is a word of finality. The appropriate department has examined the facts, has certified to complete delivery, has secured the recommendations of its Chief Engineer and has *approved* the claim in a specified amount. The last clause of the letter "and I recommend that the amount found due be paid from the Reclamation Fund—4 x 502" is a recommendation as to the specific fund from which payment should be made.*

The effect of this letter is concisely stated by Judge Kirkpatrick in his opinion in the District Court (R. 42):

> "In the case at hand the letter of transmittal says that the claim has received administrative examination, 'is approved for $8,899.30,' and it is recommended that the amount be paid. It is difficult to say what more the Secretary of the Interior could have done toward the final settlement of the claim. He had no right actually to order it paid by the Treasury and therefore merely recommended its payment, but he did, after examination, finally and unequivocally approve it. When he said that he was sending the claim for 'direct' settlement he probably had payment in mind, a step which all authorities

* By Section 16 of the Act of August 13, 1914, 38 Stat. at L. 690, 43 U. S. C. Sec. 414, it was provided that expenditures shall not be made for carrying out the Reclamation Law except out of appropriations made annually by Congress therefor. The Secretary of the Interior was simply designating the particular appropriation against which, in his opinion, the payment in question was chargeable.

agree is not final settlement within the meaning of the law."

Respondent will doubtless argue that the letter of the Secretary of the Interior in the present case, was not a determination of the date of performance and final settlement any more than was the letter of the Veterans' Bureau in *Lambert Lumber Co.* v. *Jones. Engineering & Construction Co., Inc.,* 47 F. (2d) 74 (C. C. A. 8th, 1931), Certiorari denied 283 U. S. 842. In the *Lambert* case, however, the Veterans' Bureau transmitted the claim to the General Accounting Office with a letter reading in part "examined in the sum of $10,975.39 and respectfully referred to the General Accounting Office for examination, settlement and approve (obviously intended to read 'approval') for payment in the amount found due * * *." Clearly, such a letter does not constitute a determination by the department having charge of the construction that the contractor has fully performed. On the contrary, that department passed the determination along to the General Accounting Office. Judge Kirkpatrick, in his opinion in the District Court in the present case, clearly points out the true effect of the letter of transmittal in the *Lambert* case, saying (R. 41):

"Plaintiff relies upon Lambert Lumber *vs.* Jones Engineering and Construction Company, 47 Fed. (2d) 74, but in that case the letter of transmittal from the administrative department

> charged with the work (the Veterans' Bureau) to the General Accounting Office was entirely different. It read in part, 'Examined in the sum of $10,975.39 and respectfully referred to the General Accounting Office for examination, settlement and approve for payment in the amount found due . . .' (Obviously the word 'approve' should be read 'approval.') The examination of an account is certainly not final settlement, and it was the clear intent of the letter to pass along to the General Accounting Office the function of making final settlement."

As far as we have been able to discover, there is not a single case which holds that language such as used in the letter of the Department of the Interior in the present case does not constitute sufficiently definite approval of the work to fix the date of performance and final settlement. On the contrary, there are many cases which hold that such language is sufficiently definite to determine the date of performance and final settlement if that determination is within the power of the department. For example, in *Mandel* v. *United States to Use of Wharton & N. R. Co.*, 4 F. (2d) 629 (C. C. A. 3d, 1925), Certiorari denied 268 U. S. 708, the proper officer of the Civil Engineer Corps of the Navy used the following language, which was held to constitute a determination of performance and final settlement:

> "The findings and recommendations of the board (reference A) are approved; * * * accord-

> ingly final payment under Contract No. 2427-B-X in the sum of $1,465.75 is authorized, subject to the execution by the contractors of an unqualified release of claim."

To say that the findings and recommendations of a subordinate board are approved and that *accordingly* payment is authorized in the specified amount is precisely the same as to attach the recommendations of the Chief Engineer and say that the claim is *approved* in a specified amount, as was done by the Department of the Interior in the present case. Both determinations are final so far as the Department having charge of the construction is concerned.

The Circuit Court of Appeals in its opinion in the present case conceded (R. 55) that prior to the Budget and Accounting Act of 1921 the Department of the Interior would have been the appropriate department to determine the date of performance and final settlement, and that the letter of the Secretary would have been such a determination. The majority of the court were, however, of the opinion that the Budget and Accounting Act of 1921 transferred this function to the General Accounting Office. If this conclusion is wrong, we submit that the judgment of the Circuit Court of Appeals must be reversed because it seems obvious that the letter of the Department of the Interior definitely determined the date of performance and final settlement if that Department had the power to do so.

For the reasons stated above, we submit that the Department had this power and accordingly we submit that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court of the United States for the Eastern District of Pennsylvania should be reinstated.

Respectfully submitted,

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APPENDIX.

Relevant Provisions of Budget and Accounting Act of 1921, 42 Stat. at L. 23-27.

Title III—General Accounting Office.

Sec. 301. There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 1, 1921. All other officers and employees of the office of the Comptroller of the Treasury shall become officers and employees in the General Accounting Office at their grades and salaries on July 1, 1921, and all books, records, documents, papers, furniture, office equipment and other property of the office of the Comptroller of the Treasury shall become the property of the General Accounting Office. The Comptroller General is authorized to adopt a seal for the General Accounting Office.

Sec. 302. There shall be in the General Accounting Office a Comptroller General of the United States and an Assistant Comptroller General of the United States, who shall be appointed by the President with the advice and consent of the Senate, and shall receive salaries of $10,000 and $7,500 a year, respectively. The Assistant Comptroller General shall perform such duties as may be assigned to him by the Comptroller General, and during the absence or incapacity of the

Comptroller General, or during a vacancy in that office, shall act as Comptroller General.

[Sec. 303 prescribes the terms of office, method of removal, retirement, etc., of Comptroller General and Assistant Comptroller General.]

Sec. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing, and collecting officers, shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921.

[The second paragraph of this Section relates to accounts in the Postal Service.]

Sec. 305. Section 236 of the Revised Statutes is amended to read as follows:

> "Sec. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

Sec. 306. All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the General Accounting Office. Copies of any books, records, papers, or documents, and transcripts from the books and proceedings of the General Accounting Office, when certified by the Comptroller General or the Assistant Comptroller General under its seal, shall be admitted as evidence with the same effect as the copies and transcripts referred to in sections 882 and 886 of the Revised Statutes.

Sec. 307. The Comptroller General may provide for the payment of accounts or claims adjusted and settled in the General Accounting Office, through disbursing officers of the several departments and establishments, instead of by warrant.

Sec. 308. The duties now appertaining to the Division of Public Moneys of the Office of the Secretary of the Treasury, so far as they relate to the covering of revenues and repayments into the Treasury, the issue of duplicate checks and warrants, and the certification of outstanding liabilities for payment, shall be performed by the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury.

Sec. 309. The Comptroller General shall prescribe the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States.

Sec. 310. The offices of the six auditors shall be abolished, to take effect July 1, 1921. All other officers and employees of these offices except as otherwise provided herein shall become officers and employees of the General Accounting Office at their grades and salaries on July 1, 1921. All books, records, documents, papers, furniture, office equipment, and other property of these offices, and of the Division of Bookkeeping and Warrants, so far as they relate to the work of such division transferred by section 304, shall become the property of the General Accounting Office. The General Accounting Office shall occupy temporarily the rooms now occupied by the office of the Comptroller of the Treasury and the six auditors.

[Sec. 311 relates to the appointment and removal of employees.]

Sec. 312. (a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular

report or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

[Sec. 312 (b) relates to investigations by the Comptroller General.]

[Sec. 312 (c) relates to reports by the Comptroller General on expenditures in violation of law.]

Sec. 312. (d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

[Sec. 312 (e) relates to the furnishing of information to the Bureau of the Budget.]

Sec. 313. All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the Revised Statutes.

[Sec. 314 provides for Civil Service examinations of accountants in the General Accounting Office.]

[Sec. 315 relates to transfer of appropriations.]

[Sec. 316 relates to additional compensation of employees.]

[Sec. 317 relates to transfer of employees of less than three years' service.]

Sec. 318. This Act shall take effect upon its approval by the President: *Provided,* That sections 301 to 317, inclusive, relating to the General Accounting Office and the Bureau of Accounts, shall take effect July 1, 1921.

Approved, June 10, 1921.

REVISED STATUTES, SEC. 236.

All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.

RELEVANT PROVISIONS OF ACT OF JULY 31, 1894, 28 STAT. AT L. 205-209.

Sec. 4. The offices of Commissioner of Customs, Deputy Commissioner of Customs, Second Comptroller, Deputy Second Comptroller, and Deputy First Comptroller of the Treasury are abolished, and the First Comptroller of the Treasury shall hereafter be known as Comptroller of the Treasury. He shall perform the same duties and have the same powers and responsibilities (except as modified by this Act) as those now performed by or appertaining to the First and Second Comptrollers of the Treasury and the Commissioner of Customs; and all provisions of law not inconsistent with this Act, in any way relating to them or either of them, shall hereafter be construed and held as relating to the Comptroller of the Treasury.

Section thirty-six hundred and twenty-five of the Revised Statutes is amended by substituting the words "proper Auditor" for the words "First Comptroller of the Treasury (or the Commissioner of Customs, as the case may be)."

Section thirty-six hundred and thirty-three of the Revised Statutes is amended by substituting the words "proper Auditor" for the words "First or Second Comptroller of the Treasury."

Sec. 5. The Comptroller of the Treasury shall, under the direction of the Secretary of the Treasury, prescribe the forms of keeping and rendering all

public accounts, except those relating to the postal revenues and expenditures therefrom.

Sec. 7. Accounts shall be examined by the Auditors as follows:

First.—The Auditor for the Treasury Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of the Treasury and all bureaus and offices under his direction, *all accounts relating to* the customs service, public debt, internal revenue, Treasurer and assistant treasurers, mints and assay offices, Bureau of Engraving and Printing, Coast and Geodetic Survey, Revenue-Cutter Service, Life-Saving Service, Light-House Board, Marine-Hospital Service, *public buildings,* Steamboat-Inspection Service, immigration, navigation, Secret Service, Alaskan fur-seal fisheries, and to all other business within the jurisdiction of the Department of the Treasury, and certify the balances arising thereon to the Division of Bookkeeping and Warrants. (Italics ours.)

Sec. 8. The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comp-

troller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government; *Provided,* That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account.

Upon a certificate by the Comptroller of the Treasury of any differences ascertained by him upon revision the Auditor who shall have audited the account shall state an account of such differences, and certify it to the Division of Bookkeeping and Warrants, except that balances found and accounts stated as aforesaid by the Auditor for the Post-Office Department for postal revenues and expenditures therefrom shall be certified to the Postmaster-General.

Any person accepting payment under a settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted; but nothing in this Act shall prevent an Auditor from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. When suspended items are finally settled a revision may be had as in the case of the original settlement. Action upon any account or business shall not be delayed awaiting applications for revision: *Provided,* That the Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant

is issued in payment of an account certified as provided in sections seven and eight of this Act.

The Auditor shall, under the direction of the Comptroller of the Treasury, preserve, with their vouchers and certificates, all accounts which have been finally adjusted.

All decisions by Auditors making an original construction or modifying an existing construction of statutes shall be forthwith reported to the Comptroller of the Treasury, and items in any account affected by such decisions shall be suspended and payment thereof withheld until the Comptroller of the Treasury shall approve, disapprove, or modify such decisions and certify his actions to the Auditor. All decisions made by the Comptroller of the Treasury under this Act shall be forthwith transmitted to the Auditor or Auditors whose duties are affected thereby.

Disbursing Officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursements.

Sections one hundred and ninety-one and two hundred and seventy of the Revised Statutes are repealed.

Sec. 10. The Division of Warrants, Estimates, and Appropriations in the office of the Secretary of the

Treasury is hereby recognized and established as the Division of Bookkeeping and Warrants. It shall be under the direction of the Secretary of the Treasury as heretofore. Upon the books of this division shall be kept all accounts of receipts and expenditures of public money except those relating to the postal revenues and expenditures therefrom; and section three hundred and thirteen and so much of sections two hundred and eighty-three and thirty-six hundred and seventy-five of the Revised Statutes as require those accounts to be kept by certain Auditors and the Register of the Treasury are repealed. The duties of the Register of the Treasury shall be such as are now required of him in connection with the public debt and such further duties as may be prescribed by the Secretary of the Treasury.

Sec. 11 (paragraph 2). All warrants, when authorized by law and signed by the Secretary of the Treasury, shall be countersigned by the Comptroller of the Treasury, and all warrants for the payment of money shall be accompanied either by the Auditor's certificate, mentioned in section seven of this Act, or by the requisition for advance of money, which certificate or requisition shall specify the particular appropriation to which the same should be charged, instead of being specified on the warrant, as now provided by section thirty-six hundred and seventy-five of the Revised Statutes: and shall also go with the warrant to the Treasurer, who shall return the certificate or

requisition to the proper Auditor, with the date and amount of the draft issued indorsed thereon. Requisitions for the payment of money on all audited accounts, or for covering money into the Treasury, shall not hereafter be required. And requisitions for advances of money shall not be countersigned by the Comptroller of the Treasury.

The Hurd Act (August 13, 1894, 28 Stat. at L. 278, as amended) 40 U. S. C. Sec. 270.

Sec. 270. Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials. Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no

suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further,* That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said

contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to-wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further,* That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

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IN THE

Supreme Court of the United States

October Term, 1933. No. 419.

GLOBE INDEMNITY COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, to the use of STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

In this case the respondent relies on the Budget and Accounting Act of 1921, the pertinent provisions of which are as follows:

> "All claims and demands whatever by the Government of the United States or against it . . . shall be settled and adjusted in the General Accounting Office." R. S. 236; June 10, 1921, c. 18, Sec. 305; 42 Stat. at L. 24.
>
> "Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time of

payment which shall expire before a warrant be issued in payment of an amount certified as provided in this section.

"Disbursing Officers, or the head of any executive department, . . . may apply for and the General Accounting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern such office in passing upon the account containing said disbursement." July 31, 1894, c. 174, sec. 8, 28 Stat. 207; June 10, 1921, c. 18, Sec. 304; 42 Stat. at L. 24.

"all powers and duties now conferred or imposed by law upon the comptroller of the Treasury or the six auditors of the Treasury Department . . . shall, so far as not inconsistent with this Act be vested in and imposed upon the General Accounting Office and exercised without direction from any other officer. . . . The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government." Act of June 10, 1921, c. 18, Sec. 304; 42 Stat. at L. 24.

The General Accounting Office issued its Certificate of Settlement (R. 38) and under the authority of the above quoted Act of Congress that certificate became the final settlement of the contract under the Hurd Act, and the one year's limitation for the bringing of the suit began to run from the date of that Certificate. This suit was, therefore, brought within the time allowed.

The cases relied upon by the petitioner are not in point for the reason that in none of them was there ever any submission in any way, shape, or form of the figures or the contract to the General Accounting Office under the Act of 1921, or to the Treasury Department under prior acts. A fair reading of those cases should convince the court that the only question determined in those cases

was *what* was a final settlement, and not *which* department or agency of the government was authorized to make the settlement. It was contended in some of them that payment was necessary to a final settlement. In others that formal vouchers or orders of the Treasury were prerequisites to a final settlement, and in still other cases the argument was that a final settlement had not been made if there had been held open a small item for some further review or adjustment. In not one of those cases was there considered the relative authority of the departmental officer and the General Accounting Office, or its predecessor under acts previous to 1921, the Treasury Department, and yet petitioner has adopted the casual observations of the judges writing those opinions as authority for propositions of law which were never before them.

It must be evident that even though the office of the Secretary of the Interior had forwarded a communication in which the statement was made that the claim had been finally settled by that office and then referred the whole matter to the Accounting Office, that such finding by the Secretary of the Interior would have been of no effect whatsoever because the result of such action by the Secretary would have been an attempted denial of all the provisions of the Act of 1921. As Judge Kenyon has shown in his opinion in the Lambert case (infra), as soon as the matter was referred to the General Accounting Office, no matter what action might have been taken by the forwarding office, the General Accounting Office became the sole judges of the whole situation and their finding constitutes the final settlement in the case.

This interpretation of the Act of 1921 is that adopted by the majority opinion of the court below (Record 74) which states:

"This Act empowers the General Accounting Office

to make all settlements and to render decisions upon any question involving a payment to be made by disbursing officers or by the head of any executive department. It provides that the balances certified by the Comptroller General shall be final and conclusive. The decision in Lambert Lumber Co. v. Jones Engineering & Construction Co., Inc., 47 F. (2d) 74, certiorari denied, 283 U. S. 842, sustains the view that the General Accounting Office is authorized to settle claims.

"We are of the opinion that the General Accounting Office in the instant case was charged with the duty of making final settlement and performed that duty, as evidenced by its certificate of settlement issued in October, 1927. The plaintiff's suit therefore was brought within the one year allowed by the Hurd Act."

The respondent, therefore, makes the following reply to petitioner's brief:

POINT A. The case of Illinois Surety Company vs. United States to use of J. A. Peeler, et al, 240 U. S. 214, which is relied on by petitioner, is distinguishable on its facts and is not contrary to the decision of the Court below.

In our present case, the issue is,—Did the letter of the First Assistant Secretary of the Department of the Interior (R. 33) or did the certificate of settlement of the Comptroller General of the General Accounting Office (R. 38) constitute the final settlement under the Hurd Act?

If it be assumed that the Secretary's letter is by its own terms sufficient to constitute a settlement (which assumption the petitioner makes and which is entirely unwarranted,—see page 10 of this brief) then our present case requires a decision as to the relative authority of

the General Accounting Office and of the department having charge of the work under contract. For the Peeler case to have any direct bearing on our present case, that case must have involved some similar conflict of authority. But such a conflict did not exist and the Peeler case is not in point. There was in force at that time R. S. 236 (Comp. Stat. 1913, Sec. 368) which provided that all claims by and against the United States should be settled in the Treasury Department, and as that department in the Peeler case had had charge of the work under the contract, the Treasury Department was at the same time the office by law charged with the duty of settling claims against the United States and the department having charge of the work. The entire transaction from beginning to end never left the Treasury Department. The court did not have to decide which of two departments made the final settlement and the only question before the Court was whether a determination of the amount due or payment of that amount constituted the final settlement. In our present case we must go further and decide which of two offices is authorized under the law to fix the amount due by the Government. In commenting on the Peeler case, Judge Kenyon in Lambert vs. Jones (47 Fed. 2nd 74) states (page 83):

> "The learned justice is careful to point out that the contract in question was a Treasury Department contract. It did not hold or indicate that the same conclusion would apply if the contract were in the Navy, Interior, or other departments of the Government."

Respondent earnestly submits that a careful reading of the opinion in the Peeler case will fail to disclose that Mr. Justice Hughes, who wrote the opinion, gave any weight whatsoever to the fact that the Treasury Department was in charge of the work or that that fact influenced him in the slightest degree in arriving at his deci-

sion, and yet on page 12 of petitioner's brief appears the following: ". . . this court found that performance and final settlement took place on the date on which the Administrative Department having charge of the work approved the balance due to the contractor." The same phrase "Administrative Department having charge of the work" in nearly the same language also appears on page 13 and twice on page 11. In so far as those words imply that the fact the Treasury Department had charge of the work affected the decision, they are without any foundation whatsoever. The frequent repetition of these misleading phrases in petitioner's brief is without any logical justification and their constant use attributes to the court a reason for its decision which cannot be found in the opinion itself.

Also by the use of those phrases, the petitioner would have the court believe that the word "administrative" as used by Mr. Justice Hughes refers to the department having charge of the work. Such an assumption is likewise without any foundation. On the contrary, immediately following that part of the opinion which is quoted on page 12 of petitioner's brief, the opinion itself distinguishes between an "administrative determination" and a "judicial determination":

> "Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated, if properly raised in judicial proceedings, but this does not affect the running of the time for bringing action under the statutory provision." (page 221)

For all that appears in the opinion a determination of the amount due by the General Accounting Office (in our case) or by the Treasury Department (in the Peeler case) is as fully an "administrative determination" as one made by

the department in charge of the work. See also the quotation below, this page.

Furthermore, the petitioner misinterprets the Peeler case in another respect. On page 13 and again on page 14 of its brief, it states that Mr. Justice Hughes necessarily held that the date of final settlement was not determined by proceedings under R. S. 236. When it is considered that that statute requires claims against the United States to be settled in the Treasury Department and that Mr. Justice Hughes found the settlement in the Peeler case to have been made in the Treasury Department (just where R. S. 236 requires it should have been made), it is difficult to see how petitioner comes to the conclusion that the Peeler case is authority for the proposition that R. S. 236 is inapplicable. Nothing Mr. Justice Hughes says supports such an argument. As a matter of fact, a reader of the opinion is quite definitely given to understand that the Treasury Department by virtue of R. S. 236 should effect the final settlement, regardless of what department did the work. In reviewing the Acts of Congress, the learned Justice quotes the pertinent part of R. S. 236 and then states (page 219):

> "The words 'settled and adjusted' were taken to mean the determination in the Treasury Department for administrative purposes of the state of the account and the amount due. 2 Ops. Atty. Gen. (Hall) 518, 625, 629, 630."

He also quotes with approval the statement of Mr. Chief Justice Waite, Cook vs. United States, 91 U. S. 389, 399, reading in part:

> "Thus it is seen that all claims against the United States are to be settled and adjusted 'in the Treasury Department' . . . ."

Mr. Justice Hughes was deciding whether a determination of the amount or payment constituted a final settlement. Had he desired to go beyond the question before him, and declare what governmental agency should make the settlement or declare R. S. 236 inapplicable to settlements under the Hurd Act, his dictum to that effect would have been clear and it would not have been necssary for the petitioner in this case to build its case on its own assumption of what he intended but certainly never said.

POINT B. The case of Consolidated Indemnity and Insurance Co. v. W. A. Smoot and Co., Inc., 57 F. (2nd) 995, is distinguishable on its facts and is not contrary to the decision of the Court below.

In this (the Smoot) case, not only did the constructing quartermaster reach an agreement with the contractor as to the amount due and prepare a voucher therefor, but that amount was paid by the War Department and *there was never at any time any submission of the matter in any form whatsoever to the General Accounting Office.* The court rightly decided the War Department made the settlement. It would be absurd to find the government had not made a final settlement when it had not only come to an agreement with the contractor as to the amount due but had actually paid out the money. To hold otherwise would be an extreme hardship on the material-man and would be opposed to the spirit of the Hurd Act.

The court in the Smoot case does state (page 997):

"Undoubtedly, where the Comptroller General actually makes the administrative determination of the amount due, as in Lambert Lumber Co. v. Jones Engineering & Construction Co., (C. C. A. 8th) 47 F., (2d) 74, his determination is the settlement within the meaning of the act."

In our present case, the certificate of settlement of the Comptroller General (R. 38) is apparently on a form identical word for word with the "administrative determination" of the Comptroller General in the Lambert vs. Jones case. Is it not reasonable to suppose, in view of the above quotation, that the learned author of that opinion, having agreed that the Comptroller General's certificate in the Lambert v. Jones case was an administrative determination and a final settlement, would likewise declare the certificate in the present case to have been the final settlement?

POINT C. Our present case is ruled by Lambert Lumber Co. v. Jones Engineering & Construction Co., 47 F. (2nd) 74, certiorari denied 283 U. S. 842.

In that case, the Veterans Bureau sent to the General Accounting Office a letter not materially different from the letter of the Department of the Interior in this case. There was a complete calculation of the amount due, and with the letter were sent all the correspondence and documents relating to the claim, just as in the present case. The General Accounting Office then issued its certificate of settlement apparently on a form identical with the one in the present case. Judge Kenyon of the 8th Circuit wrote the opinion, declaring the final settlement to have been made by the General Accounting Office by virtue of its authority under the General Accounting Act of 1921. This opinion contains a most exhaustive study of the Acts of Congress, the reasons therefore, and a review of all the authorities, and applying as it does to facts on all fours with those now before this court, it is a most important reference.

Upon petition to this court, a certiorari was denied (283 U. S. 842). This court has therefore affirmed the

authority of the General Accounting Office to make a final settlement under the Hurd Act.

POINT D. The letter of the Department of the Interior was not a settlement.

In view of the Lambert case (supra) the authority of the General Accounting Office to make a final settlement may be considered as established. If that is so what effect, if any, did the letter of the Department of the Interior have on the right of the General Accounting Office to exercise its authority?

The letter (R. 33) is addressed to the General Accounting Office and begins "I am enclosing herewith for direct settlement claim of (the contractor) . . . . " It includes a complete statement of how the amount was arrived at and the reasons therefor and continues, "Enclosed for your consideration is the following correspondence relative to the delay and extension requested" and appends a list of 75 letters, reports and other documents which were enclosed with the letter.

From a grammatical standpoint that letter "settles" or "determines" nothing. It specifically states the claim is sent to the General Accouting Office "for direct settlement". It is true that the Secretary has approved the amount but he has just as plainly left to another authority the duty of determining that that is the amount the government must pay. If the Secretary had felt he was binding the government, why does he "recommend" instead of ordering payment? Assuming the Secretary did not intend to make a final settlement, is the letter not just what he would be expected to write? Or assuming he did intend to make a settlement, why does he write such a letter?

As Judge Kenyon says of the letter to the General Accounting Office in the Lambert case (supra) p. 78,

"If it had been intended that the action of the Veterans' Bureau and the Bureau of Yards and Docks of the Navy Department should be a final settlement, there would have been no need of any such a letter as is set forth in finding 10. It would merely have asked for approval of the voucher."

Furthermore, there is a presumption that public officers in the performance of their official duties comply with the law.

> Masses vs. Patton, 246 Fed. 24, 158 C. C. A. 250; 22 Corpus Juris 130, et seq.

There is a legal presumption, therefore, that the Secretary must have intended, not that he was making the settlement, but that the General Accounting Office, to which Congress had delegated that duty, would do so. Any doubt as to his intention should certainly be resolved in favor of the respondent.

POINT E. Every reported case in which a claim reached the General Accounting Office holds final settlement to have been made by that office.

A great many of the cases under the Hurd Act, including those cited by petitioner on pages 18 and 19 of his brief, reveal the practice of government officials of making their own settlements without submitting the claims to the General Accounting Office as required by the Act of 1921 or to the Treasury Department as required by R. S. 236. Such cases are not in point.

In *every* case in which the matter did reach the General Accounting Office, the court has held that that office made final settlement. In addition to the Lambert case (Point C), see

> UNITED STATES vs. FRENCH, 52 F. 2d, 235.

Respondent submits that the decision of the court below is not contrary to any reported case, but that it is squarely in accord with the Lambert case (Point C) the decision in which has received the express approval of this Court.

SAMUEL W. COOPER,
Attorney for Respondent.

RUSSELL C. GOURLEY,
Of Counsel.

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STATEMENT OF THE CASE.

When the work on the government contract concerned in this case had been completed, the First Assistant Secretary of the Department of the Interior sent to the General Accounting Office a letter "enclosing herewith for direct settlement claim" of the contractor (R. 24). Subsequently the General Accounting Office issued its Certificate of Settlement (R. 28) signed by the Comptroller General who therein stated, "I certify that I have examined and settled" the claim of the contractor. Which of these two writings constitute the final settlement under the Hurd Act (Act of August 13, 1894, 28 Stat. at L. 278, as amended by Act of February 24, 1905, 33 Stat. at L. 811)? If the former letter, this suit was brought too late, but if the Comptroller General's Certificate was the final settlement, the suit was brought within the statutory period and the plaintiff (respondent herein) should recover in this suit against the surety. It is the respondent's contention that under the Budget and Accounting Act of 1921 it makes no difference what the department heads may do or say, nor how final and conclusive their language might be in attempting to make a final settlement, their efforts in that respect are utterly futile when the claim has reached and been acted upon by the General Accounting Office.

ARGUMENT.

Summary.

A. The General Accounting Office is the only agency of the government authorized by Congress to settle and

adjust claims against the government and when it has acted pursuant to that authority, the settlement made by it is binding and conclusive on the executive branch of the government.

B. The letter of the Department of the Interior did not by its own terms constitute a settlement.

C. Reply to petitioner's argument.

A. THE GENERAL ACCOUNTING OFFICE IS THE ONLY AGENCY OF THE GOVERNMENT AUTHORIZED BY CONGRESS TO SETTLE AND ADJUST CLAIMS AGAINST THE GOVERNMENT AND WHEN IT HAS ACTED PURSUANT TO THAT AUTHORITY, THE SETTLEMENT MADE BY IT IS BINDING AND CONCLUSIVE ON THE EXECUTIVE BRANCH OF THE GOVERNMENT.

Under Article I, Section 9 of the Constitution, no monies may be drawn from the Treasury except in consequence of an appropriation made by law. It must follow that Congress has power to designate the particular officers of the government who shall determine the amounts due claimants against the government and the practices of the government in regard to settlement of claims and accounting procedure, and the courts have always acknowledged the right of Congress so to do.

The Budget and Accounting Act of 1921 (42 Stat. at L. 20) reads in part as follows:

> "All claims and demands whatever by the Government of the United States or against it . . . shall be settled and adjusted in the General Accounting Office." Sec. 305.
>
> "all powers and duties now conferred or imposed by law upon the comptroller of the Treasury or the

six auditors of the Treasury Department . . . shall, so far as not inconsistent with this Act be vested in and imposed upon the General Accounting Office and exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government." Sec. 304.

"Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time of payment which shall expire before a warrant be issued in payment of an amount certified as provided in this section." * * *

"Disbursing Officers, or the head of any executive department, . . . may apply for and the General Accounting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern such office in passing upon the account containing said disbursement." 31 U. S. C. A. 74.

The Act also provides that at the head of the General Accounting Office there shall be the Comptroller General who shall be appointed by the President, subject to the approval of Congress, that his term of office shall be fifteen years and that he may not be removed from office except by Congress. With these particular provisions in mind it can easily be seen that it was the purpose of Congress to establish an agency of the government entirely independent from other executive departments and to provide for an entirely new system for the settlement of government accounts and all claims by and against the government. It seems equally clear that the position of the General Accounting Office in government affairs is

unique in that it is accountable only to Congress and not to any other branch of the government.

The court should in enforcing the Act give it that interpretation which will best carry out the purpose of Congress. In urging adoption of the Act a committee of the Senate reported as follows:

> "The Government has become notorious for lack of uniformity in its accounting methods. Administrative accounting procedures in the departments, are practically speaking, left to the ingenuity of individual employees, and as a result each bureau and office now keeps its books in accordance with its own peculiar ideas. Federal disbursing and collecting officers in the District of Columbia and throughout the United States are largely permitted to keep their local records to suit their own tastes and notions of system and procedure. Such small uniformity as may be found in these offices has been brought about by regulations emanating from the heads of the several departments and establishments. Only in the manner and form of accounting to the auditors of the Treasury is there a semblance of accounting uniformity and regularity."
>
> * * * * * * * *
>
> "With respect to the administrative examination it would be fair to say that as many systems and plans of auditing the accounts of disbursing and collecting officers and claims against the United States are in vogue today as there are separate agencies of governments. In some cases the administrative examination is a complete and full examination; in some cases it is woefully inadequate; and in other cases it exists in name only.
>
> * * * * * * * *

"This office will receive, audit, and settle the account of all disbursing and collecting offices of the Government and all claims against the United States. He will perform generally the duties now intrusted to the auditors for the various departments . . ."

(Senate Report 524, 66th Congress on amended H. R. 9783.)

Judge Kenyon, who wrote the opinion in the case of Lambert Lumber Company vs. Jones Engineering and Construction Co. (47 Fed. 2nd, 74), which will be referred to later herein, was a member of the Senate at the time this legislation was considered and was well qualified to judge the necessity for such an Act. In the case cited he states (page 80) referring to the disbursement of public funds prior to 1921:

"Even with this Accounting System in the Treasury Department passing on claims and determining amounts due from the government, the waste of public money and the scandals arising from payments on government contracts had so challenged the attention of Congress and the country that there was agitation for the creation of a budget system and to put a stronger check on government expenditures by a strengthening of the accounting system."

Counsel for the petitioner has argued that there was little that was new in the Act of 1921 in as much as previous legislation had reposed similar authority in the Treasury Department. However that may be, the plain words of the Act, the report of the Senate committee and the observations of Judge Kenyon show that Congress felt that regardless of what might have been the law previous thereto, that a change was necessary and that Congress was determined to separate from the spending and dis-

bursing agencies of the government the authority to settle and determine the amounts due upon claims both by and against the government. The Comptroller General, therefore, becomes the watch dog of the Treasury and separated as far as is practically possible from the influences which had theretofore interfered with the work of the various executive offices of the government, there has been committed to his charge the sole authority to determine whether payments from the Treasury are authorized by Congress.

Congress has not authorized any other department or agency of the government to settle and adjust claims and accounts. If there were in force some other Act which could be interpreted as conferring upon the various departments the right to settle their own contracts, then indeed there would be a conflict and it would be necessary for this court to declare the will of Congress as to this particular state of facts, but in the absence of any such enactment, the Act of 1921 stands alone and must be given the full force and effect intended for it by Congress.

It is the contention of the petitioner that the contract in this case was settled by reason of the letter of the First Assistant Secretary of the Interior (R. 24), but we have searched in vain for any legislative authority in the Department of the Interior to settle its own contracts. Respondent does not contend, however, that the lack of legislative authority prevents the Department of the Interior from making settlement under the Hurd Act where there has been no action by the Comptroller General, but we do contend that where the Comptroller General has settled a contract in pursuance to the authority conferred upon him by Congress that his action in that regard is final and conclusive upon all executive branches of the government. Strictly speaking the Department of the Interior has no "authority" in the proper sense of that word. Whatever right it may have to settle government con-

tracts has been accorded to it by the courts in cases where the General Accounting Office has never had submitted to it the contract in question. In other words the courts have always recognized, where a settlement is made by an executive department and where there has been no action by the office authorized by Congress to settle such a contract, that the finding of the department is the final settlement; but where that office, which has been duly authorized by Congress to make such settlement, settles a claim against the government, the action of such office is the final settlement of the contract and it is superior in effect to the action of any other executive official. To hold otherwise would negative the will of Congress and this thus far no court has done.

In every case in which there was action by the General Accounting Office the courts have held its decision to be conclusive on the executive branch of the government.

Lambert Lumber Co. vs. Jones Engineering, 47 Fed. (2d) 74;
United States vs. French, 52 Fed. (2d) 235;
McCarl vs. Miguel, 66 Fed. (2d) 564;
In Re Departmental Reference, 59 Ct. of Cl. 813;
Anderson v. U. S., 61 Ct. of Cl. 201;
McKnight vs. United States, 13 Ct. of Cl. 292, 307.

In his opinion in the Lambert case (supra) Judge Kenyon states, page 85:

> "We hold the final settlement here was made by the Comptroller General when he certified on April 2, 1925, that he had 'examined and settled the claim of Jones Engineering and Construction Co. for final payment,' and not by the Bureau of Yards and Docks or the Director of the Veterans' Bureau."

Chief Justice Taft in his book "Our Chief Magistrate and His Powers", page 81, writes:

"Then consider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury (now the Comptroller General). It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. . . . His work is like the work I have referred to, quasi-judicial. If the claim is rejected by him, the claimant may in some cases carry his claim into the Court of Claims, but if he decides for the claimant, the public and those interested in maintaining the side of the Government have no appeal, and his decision is final."

And the Court of Claims In Re Departmental Reference, 59 Ct. of Cl. 813, stated:

"The disallowance of part of the claim of Hubert C. Anderson was reviewed by the Comptroller General of the United States at the request of the Treasury Department, and the settlement was sustained by his decision rendered December 8th, 1923. This ruling is conclusive upon the executive branch of the government by virtue of the Dockery Act of 1894 and the Act of June 10th, 1921, 42 Stat. at L. 24. There being no authority after this decision by the Comptroller General for the Treasury Department to settle or pay the claim it can not be transmitted by the Secretary (to the Court of Claims) under Section 148."

Respondent bases its case upon the authority granted to the General Accounting Office by the Act of 1921, but the legislation and the cases prior to that Act have some bearing on the question before us and should be considered.

As early as 1817 Congress enacted legislation providing in part as follows:

> "All claims and demands whatever by the United States or against them . . . shall be settled and adjusted in the Treasury Department."

Subsequently, on March 30th, 1868, (15 Stat. at L. 54) Congress amended the Act of 1817 to read that heads of departments may not change balances certified to them by the Comptroller of the Treasury, but such balances so certified shall be final and conclusive on the executive branch of the government,

> "Provided, that the head of the proper department, before signing a warrant for any balance certified to him by a Comptroller, may submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive as hereinbefore provided."

Similar restrictions on the authority of the various departments and similar authority to the Treasury Department were provided for by the Act of July 31st, 1894 (28 Stat. at L. 208).

It will, therefore, plainly be seen that it was the policy of Congress to grant to the Treasury Department (the predecessor of the General Accounting Office) the right to determine the amount due on claims against the government and on government contracts. Here again, the courts have recognized the purpose of Congress to repose the final authority for the settlement of claims in

a single independent agency and have *in every case,* where the Treasury Department made its decision as to the amount due on the claim, found that such decision was final and conclusive on the executive branch of the government.

Chief Justice Waite in Cooke vs. United States, 91 U. S. 389, 399, stated:

> "Thus it is seen that all claims against the United States are to be settled and adjusted 'in the Treasury Department;' and that is located 'at the seat of government.' The assistant-treasurer in New York is a custodian of the public money, which he may pay out or transfer upon the order of the proper department or officer; but he has no authority to settle and adjust, that is to say, to determine upon the validity of, any claim against the government. He can pay only after the adjustment has been made 'in the Treasury Department,' and then upon drafts drawn for the purpose by the treasurer."

In McKee vs. United States, 12 Ct. of Cl. 504, 532, the court stated:

> "The Comptrollers of the Treasury are neither contracting nor disbursing officers. Within the proper functions of their offices they are above the review of the highest executive authority, and their decisions are subject to only judicial revision. Substantially all accounts must pass under their eye and receive their approval. . . . But the business of the Comptrollers is to determine what payments shall or shall not be made on behalf of the United States. These functions of office were a part of the wondrous birth of the Treasury system, and have remained unchanged from the foundation of the Government to the present time.

The only statute which has been passed since the First Comptroller's office was established is declaratory and mandatory as to their powers. (Act 30th March, 1868, 15 Stat. L., 54."

"Because of limitations imposed upon the powers of disbursing officers, it is often desirable to present the claim for direct settlement to the auditor for the department, who is an accounting officer of the Treasury. The auditor may allow the claim in whole or in part. If his action is not satisfactory, either to the claimant or to the head of the department affected, an appeal may be taken to the Comptroller of the Treasury for its revision. In the absence of an appeal, the settlement of the auditor is 'final and conclusive upon the executive branch of the government.'"

St. Louis, B. & M. R. Co. vs. United States, 268 U. S. 169, 174.

See also:

Winnisimmet vs. United States, 12 Ct. of Cl. 319; United States vs. Lynch, 137 U. S. 280.

Consequently, both before and after the Act of 1921, the courts have uniformly held that settlements made by the General Accounting Office or by the Treasury (as the case might be) were the "final settlements" and that the action of other administrative officers were of no effect and were not binding on the government.

The cases thus far considered are those in which the General Accounting Office (or its predecessor the Treasury Department) had passed upon a claim. The courts, as we have shown, have consistently treated such action as the final and conclusive settlement regardless of what other departments of the government may have done. There is a long line of cases, however, in which it appears that no submission of the claim had ever been made to the General Accounting Office, or to the Treasury Department. It is upon those cases that petitioner relies. It should be perfectly obvious that such cases have no bearing on the case now before the court. We do not claim that the General Accounting Office alone can make a final settlement, but we claim that where it has acted its decision is controlling. Consequently all those cases cited by the petitioner where there was no action by the General Accounting Office are beside the point and the opinions therein contained could at most be only dicta. As a matter of fact in only one of the score or more of cases cited by the petitioner was the court called upon to make any decision as to the right or authority of one officer or another to make a final settlement. Manifestly, since those courts were never called upon to weigh the respective authorities of two offices, it is difficult to see how their opinions could in any respect be applicable to this case.

Congress has authorized the General Accounting Office to make final settlement and where a claim is never even submitted to that Office and where some Department officer has assumed the right to make a settlement the courts have naturally recognized that settlement as the final settlement of the contract under the Hurd Act. To hold otherwise would mean that many claimants would never get their money. Whatever standing such settlements have in the eyes of the law is given to them by the courts and not by Congress. Petitioner has endeavored to apply to this case, where a settlement was made by the officer

specifically empowered by Congress to perform that duty, a principle of law drawn from cases where there was no action of any kind by the General Accounting Office or by the Treasury.

Moreover, in only one of the cases relied upon by the appellant was the court called upon to make a decision as to the relative authority of the Comptroller General and another government officer and that was in the case of Consolidated Indemnity and Insurance Company vs. Smoot, 57 Fed. (2d) 995. In that case the War Department not only determined the amount due under the contract, but paid out the money and there was no submission of the matter to the General Accounting Office at any time whatsoever. The surety naturally raised the point that the suit had been brought too soon for the reason that under the Act of 1921 there had been no submission of the claim to the General Accounting Office. The court properly held that in the absence of a submission of the matter to the General Accounting Office the settlement by the War Department was final. Any other decision would have been ridiculous. The court could not seriously say that there had not been final settlement of the contract by the government when the money had actually been paid to the contractor.

In all the other cases relied upon by the petitioner, a great many of which are cited on pages 26, 27 and 28 of its brief, not only was there no action by the General Accounting Office or by the Treasury Department, but the question of the right of the department officer to make the final settlement was never questioned and it was, therefore, unnecessary for the courts to decide any such question. Those cases almost without exception arose over a dispute as to *what* was final settlement. For instance in Illinois Surety Company vs. United States to the use of Peeler, 240 U. S. 214, which appears to have been a leading case, the question before the court was

whether or not payment was a prerequisite to final settlement. It was held that payment was not necessary and final settlement under the Hurd Act was defined as the determination by the proper government official of the amount which the United States was entitled to receive or obligated to pay. There was no discussion in the case whatsoever as to who was the proper officer to make such a determination and the courts which have followed the Peeler case have likewise not had before them the necessity for determining who that official was. As in the Peeler case a number of these cases have arisen due to the dispute as to whether payment was final settlement. In other cases the government had prepared a final statement of the figures showing that it had retained a certain percentage of the contract price to cover possible future claims or damages (United States vs. Starr, 20 Fed. 2d, 803), and in still other cases a small balance had been held open pending the receipt of some formal approval as to that item (Arnold vs. United States, 280 Fed. 338).

However, the petitioner has used frequent quotations from these cases to show that various department heads were authorized to settle contracts, ignoring completely that the question of the authority of the various officials was never raised by the litigants or considered by the court. It is true that the settlements in those cases were made by the officers in charge of the construction work. However, not one of the courts which wrote those opinions either expressly or impliedly based its decision upon that fact and there is no authority whatsoever, either judicial or legislative, for the proposition that the department having charge of the work is the department to settle the contract. As stated before, the cases relied upon by the petitioner all turn upon what is, and not who makes, a final settlement. The value of such cases for our purpose only lies in their interpretation of the meaning of the words "final settlement". In that respect they follow the

Peeler case and define "final settlement" to mean the administrative, as distinguished from judicial, determination of the amount which the government is finally found to pay, and as Congress has directed that the determination of that figure shall be made by the General Accounting Office, we submit that the action of that Office in determining the amount due is the final settlement as those words are defined by the Peeler case and all of the other cases which follow it.

It is, therefore, our position that the Certificate of the General Accounting Office was the determination of the amount due the contractor and in that respect complied with the requirements of the Peeler case and the other numerous decisions defining a final settlement. Furthermore the Certificate of Settlement was issued by the very officer charged by law with that duty, and under the Act of 1921, when the Comptroller General makes such a settlement, other departments are powerless to overrule him and their actions in that respect are void. We submit that it makes no difference what the Secretary of the Interior may have written, nor how positive nor how final the language he may have used, for when the Comptroller General passes upon the claim, his decision is the only settlement made by the government.

B. THE LETTER OF THE DEPARTMENT OF THE INTERIOR DID NOT BY ITS OWN TERMS CONSTITUTE A SETTLEMENT.

The attention of the court is called to the two writings appearing on page 24 and page 28 of the record. The first, which petitioner claims was the final settlement, is a letter from the First Assistant Secretary of the Department of the Interior addressed to Claims Division, General Accounting Office. It begins "I am enclosing herewith for direct settlement the claim of the Sanitation

Corporation" and concludes, "the claim has received administrative examination, is approved for $8899.30, and I recommend that the amount found due be paid from the reclamation fund—4 X 502". In the body of the letter he has set forth in detail how that balance was arrived at and states that he is enclosing certain correspondence relative to the delay "for your consideration". Then follows a list of some seventy-four documents relating to the claim.

Subsequently the General Accounting Office issued its "Certificate of Settlement" (p. 28 Record) signed by the Comptroller General. It begins, "I certify that I have examined and settled the claim(s) of the Sanitation Corporation . . . and find that the sum of Eight thousand eight hundred ninety-nine Dollars and Thirty Cents is due from the United States to said claimant(s), payable from the appropriation(s) 4X502. . . ." and concludes, for the reasons stated, "it must be concluded that the claimant company is liable to the United States for liquidated damages for one hundred sixty three days' delay at Twenty-five Dollars per day. Issue warrant(s) and send same as above." The Comptroller General likewise reviews the reasons for certain deductions and in making his finding relies upon the correspondence submitted by the Interior Department.

The whole question at issue here is which of these letters constituted the final settlement as intended by the Hurd Act. It is admitted that one of them was a final settlement. It is the respondent's contention that the first letter simply submitted the claim to the General Accounting Office so that that office could make the final settlement. The claim was enclosed "for direct settlement". There was also enclosed certain correspondence "for your consideration" and payment was "recommended". On the other hand the Comptroller General specifically certifies that he has settled the claim and that he finds a definite

sum to be due by the government and he concludes that the contractor is liable for damages for delay in completion. It will be noticed at once that the language which the Interior Department has used is not final or conclusive upon the government. The writer has simply approved and recommended. On the other hand the certificate of the General Accounting Office uses words of finality. The matter is closed.

The Secretary's letter states (R. 24) "The contractor has filed written application for extension of time . . ." If the writer felt he had settled the claim, would he have not also stated that the application had been refused? So far as the letter shows, no action was taken on this application.

Our opponents have argued that the use of the word "approved" (R. 28) makes the letter a final settlement. This cannot be. One "approves" the "act" of another. Approval itself is not an act, whereas a settlement must be something done. Settlement is defined in the dictionary as "the act or state of being settled." Approval is "approbation or ratification".

Furthermore, it is only natural that the Interior Department, having examined a claim, should give the claim its approval or disapproval. The Department would not recommend payment of a claim it disapproved.

The trial court as well as the petitioner has relied upon general statements of the law found in the Peeler case which have been widely quoted, that final settlement occurred "when, so far as the government was concerned, the amount which it was *finally* bound to pay, or entitled to receive was *fixed* administratively by the proper authority", and again, that final settlement is an "appropriate administrative *determination* with respect to the amount due". As shown hereafter, that case was entirely different on its facts from the present one, but if those statements be accepted as authoritative, the letter of the In-

terior Department does not become a final settlement for the reason that it lacks the finality and conclusiveness required by the above quotations and indicated by the words in italics (which our ours). The one quotation requires that the amount due be "fixed"; the other quotation states that the final settlement shall be a "determination" of the amount due. It does not need a dictionary to convince the court that these two words are words of finality and conclusiveness and if the Secretary of the Interior intended that his letter should fix or determine the amount that was due in the sense that he was concluding or binding the government, then he should be expected to use in his letter some words of finality, conclusiveness, or determination. The court will search in vain through that letter for any words or any indication that the Secretary of the Interior had any intention whatsoever of *binding* the government to the payment of the amount which he approved.

Even if it be assumed that he was the authorized government official to make such a finding, the mere fact that he has made a mathematical calculation is not of itself any indication whatsoever that he has intended such a calculation to be binding on the government. It is not only necessary that the official have the authority, but that he *exercise* it. On the other hand the language which he has used not only fails as an assertion of authority, but is clearly a submission of the matter to another authority. He encloses for direct settlement, he recommends that payment be made, and he forwards correspondence for the Comptroller General's consideration.

If it be assumed that he had intended a final settlement and an administrative determination of the amount due, why should he submit to the Comptroller General seventy-four letters and reports relative to the matter, why should he explain with such care how the amount was arrived at and the reason for the deductions which he

recommends, and why did he not find as a fact that the amount stated was the amount which the government should pay?

A situation almost identical with that in the present case is found in the case of Lambert Co. vs. Jones Engineering and Construction Co., 47 Fed. (2d) 74 (Certiorari denied 283 U. S. 842). The opinion was by Judge Kenyon.

In that case the Veterans' Bureau sent a letter to the General Accounting Office reading in part as follows:

> "Examined in the sum of $10,975.39 and respectfully referred to the General Accounting Office for examination, settlement, and approve for payment in the amount found due to Jones Engineering and Construction Company, Inc. a/c Chief Bureau of Yards and Docks, Navy Department, Wash., D. C., from the appropriations stated below . . ."

There was included in this letter a statement of how that amount was arrived at, together with the correspondence and documents relating to the claim. After receipt of the letter, the Comptroller General of the General Accounting Office certified that he had "examined and settled the claim of Jones Engineering and Construction Company for final payment". This certificate appears to have been upon a form used by the General Accounting Office identical with the one in evidence in the present case, and the letter of the Veterans' Bureau is practically the same as the letter of the Interior Department in the present case. Although both petitioner and the trial court state there is a difference between the two letters, neither has pointed out any respect in which they differ. From the standpoint of ordinary grammar, both letters fail to show any intention on the part of the writer to *settle* anything or to make any *final* finding but both pass on that duty to the General Accounting Office.

Judge Kenyon was of the same opinion for he states (p. 78),

> "If it had been intended that the action of the Veterans' Bureau and the Bureau of Yards and Docks of the Navy Department should be a final settlement, there would have been no need of any such a letter as is set forth in finding 10. It would merely have asked for approval of the voucher."

and (p. 81),

> "We do not see how, in view of the history of the accounting system of the government, and especially in view of section 71, 31 USCA, it can be claimed that the Comptroller General of the United States would have no authority to settle the matters arising under the contract involved in this case when requested so to do by the heads of departments having charge of the work.
>
> "What was the use of asking the Comptroller General to make direct settlement of this claim if he had no authority so to do, or if it had already been settled? Why did the Veterans' Bureau use the term 'examined' instead of 'settled' if it understood a final settlement had been made? The Chief of the Bureau of Yards and Docks had made an 'administrative examination,' not an 'administrative settlement.' There could not be two final settlements. How can there be a final settlement when some other power has authority to turn it over and make another one? Section 74, c. 2, title 31, USCA, provides:
>
> > 'Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.'
>
> "If the claimed settlements of the heads of

> bureaus are final, then why are they not final as to the Comptroller General? How can a court say that, although under the act there is general power in the Comptroller General to make settlements, to reopen matters and obtain further evidence necessary to a settlement, the 'final settlement' under section 270 (40 U S C A) is an entirely different thing, with which he had nothing to do? Congress has not said so."

Although Judge Kenyon limited his actual decision to the facts of the case before him, it is equally true that had it been necessary to do so, he would unquestionably have found that the General Accounting Office made the settlement, regardless of what the forwarding office may have done. His whole argument and his determination to give effect to the Act of 1921 would require such a conclusion.

In arriving at his decision, Judge Kenyon considered and cast aside as obsolete or irrelevant the same line of cases relied upon by the petitioner. Substantially, the same arguments were made in that case as petitioner now offers, and with the facts alike, it is difficult to see how there can be any different decision.

This Court gave a certain approval to Judge Kenyon's opinion when it refused a certiorari (283 U. S. 842).

We submit that the letter of the First Assistant Secretary of the Interior (in our own case) is not by its own terms a final settlement as it submits the claim to another authority for "final settlement" and does not in any way show the *intention* of the writer to *settle, determine* or *fix finally* the amount due by the government. It left the *final* decision to the General Accounting Office.

There is a legal presumption that public officers have complied with the law.

Masses vs. Patton, 246 Fed. 24;
22 Corpus Juris, 130.

Can it not be assumed that the Secretary of the Interior wrote his letter with the Act of 1921 in mind and in compliance with the requirement therein that the General Accounting Office should settle the claim? Any doubt as to the Secretary's intention should certainly be resolved in favor of appellee.

On pages 32 and 33 of the Record are printed two letters, one by attorneys for the subcontractor, and a reply thereto by the General Accounting Office. The attorneys request the date when final settlement was made and in response to that inquiry the General Accounting Office states "you are advised that the final payment was made November 5, 1927". Counsel submits that the attorneys had a perfect right to rely upon the information given by the General Accounting Office. If claimants cannot rely upon the statements made by government officers and if they are put to the duty of examining and interpretating all of the official correspondence and documents hopeless confusion will be the only result. Although the General Accounting Office has used the term "final payment" it is used in response to the attorneys' inquiry and counsel were entitled to rely upon the information thereby given.

American Bonding Co. vs. Franchini, 233 Fed. 364;
United States vs. Arnold, 268 Fed. 130;
Arnold vs. United States, 280 Fed. 338.

C. REPLY TO PETITIONER'S ARGUMENT.

Summarized, the argument of our opponents is (1) subcontractors should not be required to wait even the short additional time for a settlement by the General Accounting Office, (2) the department in charge of the work should finally determine the amount due by or to the government, and (3) if such department does make a settlement, it is final and conclusive on the General Accounting Office.

Such an argument might well be addressed to Congress, but not to a court, for it is not based on any statute or judicial opinion. As previously stated, no court has yet stated that the fact a department has charge of construction work entitled it to make final settlement of the contract. The cases cited by petitioner show that settlements have been made by departments only in the absence of action by the Treasury Department or by the General Accounting Office.

Furthermore, as to engineering details, the General Accounting Office is entitled to a preliminary examination and report by the construction officers. Congress so provided in the Act of 1921, realizing of course that the General Accounting Office could not, without the assistance of the other executive branches of the government, come to any intelligent decision.

For over a hundred years Congress has consistently made clear its purpose that the amount due on a contract or a claim shall not be determined by the contracting officers, but shall be left to the judgment of an independent authority. Never during that long period has it altered its stand. It has, on the contrary, sought better methods of attaining that end and on a number of occasions enacted new laws, each one strengthening and increasing the authority of the Treasury, and finally created the General Accounting Office.

The advantages and disadvantages of having the contracting officers settle contracts have no doubt been argued

out on the floor of Congress and in committee many times, but Congress has declared its preference and having done so, the question is no longer arguable. Claims against the United States shall be settled and adjusted in the General Accounting Office and its decision shall be final and conclusive. Of what use then to argue the advantages of settlements by contracting officers?

Reply to Petitioner's Point A.

The phrase "engineering settlement" has been coined by petitioner and is not used in any case. In the Peeler case, to which so much space has been given, the only question before the Court was whether actual payment of a claim or merely a determination of the amount due constituted final settlement. The Court held that payment was not a settlement under the Hurd Act but that when the amount which the government "was finally bound to pay or entitled to receive was fixed administratively by the proper authority" there was a final settlement. That amount which the government "was finally bound to pay" is the very amount which Congress has declared shall be determined by the General Accounting Office which it declares to be "the proper authority" for so doing.

The word "administratively" in the definition of final settlement is evidently used in contradistinction to "judicial", for immediately following the first quotation appearing on page 10 (petitioner's brief) the court stated:

> "As an administrative matter, it does not depend upon the consent or agreement of the other party to the contract or account. The authority to make it may not be suspended, or held in abeyance, by refusal to agree. Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated, if properly raised in judicial proceedings, but this does

not affect the running of the time for bringing action under the statutory provision." (p. 221)

The General Accounting Office is an administrative office.

In the Peeler case the construction work was in charge of the Secretary of the Treasury, and in the early part of its opinion the court comments in some detail upon the fact that under legislation then in force all claims against the United States were to be settled in the Treasury Department. Except for its definition of the term "final settlement", the Peeler case is of no use in our case, where the question is, who is the proper authority to settle and not, what is a settlement.

The numerous cases cited on pages 12 and 13 of petitioner's brief follow the Peeler case. In all of them, the dispute was whether or not the amount due by the government had been finally determined, not whether the proper authority had made the calculation. In fact, few if any of these cases gave any consideration whatever to the authority of the settling officer to act. That question was not before the courts for determination.

The long quotation on page 14 et seq. is from a case which determined that suit under the Hurd Act might be brought six months after completion of the work to the substantial satisfaction of the government and need not be deferred until six months after complete satisfaction and actual completion of the work. Here too, there was no need for a decision, and the court did not pass upon, the authority of the officer to settle the contract. Questions not raised by litigants need not be considered by the court.

Reply to Petitioner's Point B.

Our opponents are in error in stating (page 17) that the court below held that the date of final settlement cannot be fixed by the department in charge of the work and must be fixed exclusively by the General Accounting Office. The

court did say that the certificate of the General Accounting Office was the final settlement. It gives no indication whatsoever of what its opinion would be in a case where there was no reference of the matter to that Office.

On page 19 petitioner argues that the General Accounting Office is not in a position to judge the quality or completeness of work performed for the government. Neither is the Secretary of the Interior. He depends on his subordinates and the Comptroller General can require the same proofs before making a settlement.

Petitioner argues the Act of 1921 is not new law. As previously shown (page 10 this brief), every court that had occasion to consider the respective authorities of the Treasury Department under legislation prior to 1921 and other departments found the actions of the Treasury Department in settling claims to be the action of the government, and binding and conclusive on other departments of the government. Petitioner should show that previous to 1921 the courts interpreted the Act of 1817, 1868 and 1894 as conferring no authority on the Treasury Department to make settlements, but this it cannot do. There are no such cases.

Furthermore, the mere adoption of the Act of 1921 reaffirms the determination of Congress to separate in different agencies the right to contract and build for the government and the authority to settle the amounts due the various claimants for the work contracted for. The establishment of the General Accounting Office with its augmented powers and its complete independence from all other executive branches of the government clearly manifests that purpose.

The cases cited by petitioner on pages 26, 27 and 28 are not in point for the reasons previously asserted: (1) The courts did not examine the authority of the settling officer, and (2) they had no occasion to do so. The litigants did not request it. In all the quotations given by appellant,

there is not a single attempt to trace, determine, explain, or otherwise examine the authority of the settling officer. It was on account of the unsatisfactory manner in which these "engineering settlements" had been made, that the Act of 1921 was made into law.

It is true that subcontractors will be slightly delayed by having to wait for settlements by the General Accounting Office, but that disadvantage will be more than compensated for by the certainty of the Comptroller General's certificate of settlement. In those cases where the claim was not sent to the General Accounting Office or to the Treasury Department, it appears that settlements have been made not only by Department heads, but by chief engineers, architects, constructing quartermasters, bureau chiefs and almost every petty official in the government. It is a mystery how a subcontractor could tell who to go to, or how he could learn when his contract had been settled, and this uncertainty has caused many a claimant the loss of all benefit of the Hurd Act.

Reply to Petitioner's Point C.

This part of petitioner's argument is an attempt to show that the language used by the Secretary of the Interior is sufficiently conclusive to constitute a final settlement. It is stated that the language of letters quoted from other cases is no more final than the language of the Secretary's letters. The Mandel case is quoted (page 35), but it will be noticed that the writer of that letter "approved" the "findings" of another body and thereby adopted as his own such findings. He did not merely *approve* a certain sum as being due by the government, but approved the *finding* of another authority that a certain sum was actually due. Also the letter in the Mandel case does not show any submission of the matter to another authority which is shown in the letter in our case.

To constitute a settlement we submit that the officer find as a fact that a certain sum is owing by the government. In our present case, the First Assistant Secretary examined the claim, calculates the amount and recommends that payment be made. He fails utterly to state as a fact that the government owes the contractor that amount of money, but does submit the claim to the General Accounting Office "for direct settlement". Interpretation of this letter has been fully discussed on pages 15 et seq.

We submit that not only was the Secretary's letter insufficient to constitute a settlement, but that regardless of its interpretation the Certificate of Settlement issued by the General Accounting Office was the final settlement of the contract; and that the suit was brought in proper time and the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Of Counsel.

SUBJECT INDEX

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1933. No. 419.

GLOBE INDEMNITY COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA, to the use of STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED.

BRIEF OF AMICUS CURIAE.

I. PRELIMINARY STATEMENT.

Truscon Steel Company is use-plaintiff in a suit upon a contractor's surety bond given in connection with the construction of certain public buildings at the United States Veterans' Hospital, Somerset Hills, New Jersey. In this case, the director of construction of the Veterans' Bureau submitted to the Veterans' Administration a detailed statement of the account for the construction of the public improvement, setting forth the facts as to completion and to delay therein, recommending that the work be accepted, that settlement on the basis of the figures set out in the memorandum be approved, that payment of designated

vouchers be authorized and that the matter be submitted to the General Accounting Office for direct settlement. This memorandum was administratively approved by the Director of Veterans' Administration. Suit was instituted on the bond in the District Court of the United States, Eastern District of New Jersey, and there is still undetermined the surety's contention in this suit that Truscon Steel Company does not have the present right to sue on the bond because final settlement has not yet been made by the General Accounting Office.

There is now considerable uncertainty as to what constitutes the date of final settlement within the meaning of the Heard Act, especially where the papers have been forwarded by the administrative department to the General Accounting Office for "direct settlement." Subcontractors no longer know when to start suit on a public works bond. Neither do they know whether it is proper to intervene in a suit first brought where a surety company has made the defense that the action was premature, even though it was instituted more than six months after the executive department having the work in charge administratively determined that the United States had no claim against the contractor's surety bond.

As stated in

Illinois Surety Co. v. United States, to use of Peeler, 240 U. S. 214 (1916), at page 221:

> "It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six month period runs."

In view of the billions of dollars now appropriated by the United States for public work, meritorious claims under the Heard Act should not be subordinated to or delayed by a mere procedural question.

By reason of the importance of the issue involved, as well as the fact that the case at bar is based on a contract which is not a standard Government form, Truscon Steel Company, having obtained the written consent of all counsel of record so to do, respectfully submits these views as *amicus curiae*.

II. ARGUMENT.

POINT A. THE DECISION BELOW POSTPONES UNDULY AND DELAYS UNNECESSARILY THE DATE ON WHICH LABOR AND MATERIALMEN MAY INSTITUTE SUIT ON THE BOND AND HENCE IS IN CONFLICT WITH THE DECISION OF THIS COURT IN ILLINOIS SURETY CO. v. UNITED STATES TO THE USE OF J. A. PEELER, ET AL., 240 U. S. 214, AND THE PURPOSE OF THE HEARD ACT.

The object of the Act of Congress commonly known as the "Heard Act" (the bill which subsequently became the Act of 1894, having been introduced by Congressman John T. Heard), is to assure to the United States that a high grade of subcontractors will bid on public work at low prices because the risk of non-payment is reduced by being shifted to a paid corporate surety. The United States profits if payment to labor and materialmen, in the event that a contractor defaults, is rendered speedy and certain.

> "The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanic's lien in the case of public buildings), would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material

will be furnished, because of the assurance that the claims will be paid."

Equitable Surety Co. v. McMillan, 234 U. S. 448, 456 (1914).

If this Act of Congress capable of being so construed by the court as to effect the above purpose is, on the contrary, so construed as to delay the date on which the subcontractor may institute suit on the bond, such a construction of the statute tends to defeat the purpose of the legislation and thus prejudices not only the subcontractor but also the United States.

Until recently the reported cases justified the prevailing opinion that final settlement within the meaning of the Heard Act took place when the amount which the United States was finally bound to pay or entitled to receive was fixed administratively by the executive department having the work of construction in charge, this administrative determination being speedy, clear, fixed by public record and readily ascertainable.

In the following cases, the contract was awarded subsequent to the effective date of the Budget and Accounting Act of 1921. Nevertheless, the several Courts sustained suits brought more than six months but within a year after the department in charge of the construction (*i. e.,* the War Department, Department of Agriculture), determined in the regular course of its administrative duties, that the United States had no claim under the surety bond. The courts held such dates to be the dates of final settlement.

Southern Surety Co. v. Western Pipe & Steel Co., 16 Fed. (2d) 456 (C. C. A., 9th 1926);

United States, to use of Stallings v. Starr, 20 Fed. (2d) 803 (C. C. A., 4th 1927);

Consolidated Indemnity & Ins. Co., v. Smoot, 57 Fed. (2d) 995 (C. C. A., 4th 1932), certiorari denied, 287 U. S. 613;

U. S. F. & G. Co. v. United States, to use of Price, 65 Fed. (2d) 639 (C. C. A., 9th, 1932).

If the only public officer who can make final settlement since the Budget and Accounting Act of 1921 is the Comptroller General, then these cases were decided erroneously.

The only cases which have held that final settlement was made by the General Accounting Office are cases wherein the department having the work in charge was unwilling to take the responsibility of making such an administrative finding and forwarded the record to the Comptroller General for that purpose.

The record in this case does not permit illustrations to show the time which often elapses between the date when an administrative finding that there is no claim by the United States against the surety on the bond is made by the office of the Government having charge of the work of construction and the later date when the office of the Comptroller General audits the accounts.

No reflection is intended to be cast on the General Accounting Office. It is fitting that the formal audit heretofore made by the Treasury Department and now made by the General Accounting Office should proceed as slowly as the circumstances require. It is equally important, however, once it is clear that the United States has no present claim against the surety on the contract bond, that the respective rights and liabilities of the unpaid subcontractors and the surety be speedily ascertained. The General Accounting Office may contend that it is prepared, in proper cases where there is an urgent demand, to make settlement within a few days after all of the facts are pre-

sented to it. Whether or not such delay in the settlement of claims as may take place is due to the fact that the administrative officers have failed to furnish the necessary evidence of the action taken by them or the contractor has failed to furnish some essential evidence, it is obvious that delay must take place if there can be no "final settlement" under the Heard Act until the General Accounting Office audits the records of the department in charge of the construction.

Subcontractors make claims on bonds when contractors default. Usually, where a building contractor on government work defaults, the surety assumes the burden of completion and finds that the sum it must expend to complete the contract, plus the claims of the contractor's unpaid labor and materialmen, exceeds the retained percentage held by the United States. The contractor has no interest in expediting final settlement because there is no pecuniary profit in the transaction for him by reason of his default. The surety may well conclude that, since the amount it is compelled to pay out greatly exceeds the sum which it is to receive from the United States as the retained percentage withheld from the contractor, there is no need for it to accelerate the date on which suit may be instituted against it by unpaid subcontractors. Thus, notwithstanding the efficiency of its auditing force, the lack of data required to make the final audit and sanction payment, may well delay the General Accounting Office.

The executive department having the contract in charge, however, has before it sufficient data to enable it to determine promptly after the completion of the public improvement whether the United States will be required to proceed on the contractor's bond or whether, especially where the surety company completed the contract to the satisfaction

of the United States, the only parties who need the protection of the bond are the unpaid labor and materialmen.

It was not the intent of Congress to require subcontractors to wait an uncertain period until they could commence to prosecute their claims under the public works bond.

> "Just as the fact that the right to sue on the bond is not delayed by the contingency that the determination of the officer may not be approved by the courts" (case) "so it is not to be delayed by the contingency that such determination may not be approved by the Comptroller General's office in its auditing of the accounts."
>
> *Consolidated Indemnity & Insurance Co. v. Smoot*, 57 Fed. (2d) 995 (C. C. A. 4th, 1932), certiorari denied, 287 U. S. 613.

To the same effect is

Arnold v. United States, for use of Guimarin, 280 Fed. 338 (1922) (C. C. A., 4th, 1922).

POINT B. THE PRIOR RIGHTS OF THE UNITED STATES UNDER THE BOND ARE AMPLY PROTECTED IF LABOR AND MATERIALMEN MAY SUE SIX MONTHS AFTER THE EX PARTE ADMINISTRATIVE DETERMINATION BY THE DEPARTMENT HAVING THE WORK OF CONSTRUCTION IN CHARGE OF THE AMOUNT DUE TO OR FROM THE CONTRACTOR, BECAUSE THE HEARD ACT DOES NOT CONSTITUTE A LIMITATION ON THE UNITED STATES.

It was the purpose of the amendment of 1905 to remedy the defect in the Act of 1894 by assuring to the United

States adequate opportunity to enforce its demands against the contractor's surety and priority with respect to such demand.

Illinois Surety Co. v. United States to use of Peeler, 240 U. S. 214, 218 (1916).

This purpose was accomplished by requiring other creditors to refrain from suit for a period of six months after completion and final settlement and providing that, if the United States has a claim under the bond, it should have priority over other claimants.

As thus restricted, the provisions of the statute were to be beneficent for the subcontractors.

United States v. Geo. F. Pawling Co., 297 Fed. 65 (C. C. A., 3rd 1924).

The construction of the statute for which this brief contends will not prejudice the United States because subcontractors are required, in any event, to refrain from suit for a period of six months after final settlement by the administrative department and the institution of a timely suit by a subcontractor, does not prejudice the United States because the Heard Act does not constitute a limitation on the United States.

United States v. Marshall, 225 Fed. 687 (1914), affirmed 225 Fed. 760 (C. C. A. 2nd, 1915);

Antrim Lumber Co. v. Hanan, 18 Fed. (2d) 548, (C. C. A., 8th) (1927).

These cases hold that the United States may sue on the bond even after the expiration of the period of one year after final settlement.

While the Heard act is ambiguous, its purpose is bene-

ficial, and the courts should try to give coherence to its provisions and accomplish the intention of Congress.

Bryant Co. v. N. Y. Steamfitting Co., 235 U. S. 327 (1914);

London & L. Indemnity Co. v. Smoot, 287 Fed. 952 (1923) (C. A., D. C.).

POINT C. THE CASE OF LAMBERT LUMBER CO. v. JONES ENGINEERING CO., 47 FED. (2d) 74, CERTIORARI DENIED, 283 U. S. 842, DOES NOT GOVERN IN THE CASE AT BAR BECAUSE, IN THE LAMBERT CASE, THE VETERANS' ADMINISTRATION DID NOT TO MAKE FINAL SETTLEMENT AS DEFINED BY THIS COURT IN ILLINOIS SURETY CO. V. UNITED STATES TO THE USE OF J. A. PEELER, ET AL., 240 U. S. 214.

The record in the Lambert case shows that the principal contract was required to be completed on or before September 3, 1924. The work was actually completed September 20, 1924. The contract required liquidated damages at the rate of Fifty Dollars a day to be deducted. There were certain extensions granted to the contractor because of abnormal weather conditions. Various officials of the Veterans' Administration corresponded with the contractor and in due course the contractor submitted an executed release of all claims under the contract in consideration of the payment by the United States of the sum of $10,975.39. This sum was computed by deducting from the unpaid balance of the contract price $850.00; *i. e.*, delay of seventeen days at the rate of Fifty Dollars per day. A voucher for $10,975.39 was prepared and then the papers were forwarded to the General Accounting Office, accompanied by a

letter, which is quoted on page 76 of the printed report of the case. This letter shows conclusively that the Director of the Veterans' Administration forwarded the record to the Comptroller General to compute the amount payable to the contractor because of the delay in completion and the abnormal weather conditions during the performance of the work. This letter, taken as a whole, shows clearly that the Veterans' Administration did not undertake to make a final settlement, or any settlement whatever, but that it had merely examined the account, obtained from the contractor an agreement on the amount which he would accept in satisfaction of his claim, and then the Veterans' Administration, without either an express approval or even a recommendation, passed the burden of making settlement to the Comptroller General. Thus the "final settlement" made by the Comptroller General in the Lambert case was the only settlement made by any governmental authority.

The decision in the Lambert case is reconcilable with the Peeler decision and the contention of the petitioner in the case at bar. An inspection of the printed briefs in the Peeler case shows conclusively that this final settlement letter had not been approved by the auditor of the Treasury Department or the Comptroller of the Treasury (transcript of record, Peeler case, p. 38). The surety in the Peeler case contended that final settlement could be made only by such auditor and not by the Secretary of the Treasury (Brief, p. 21). However, appreciating the importance of removing all uncertainty, as far as possible, as to the date from which the time limit would begin to run, the Court definitely held that the statute contemplates the ex parte "administrative" determination of the amount due to or from the contractor under the contract. It decided that final settlement took place on the date the Secretary of

the Treasury approved the final settlement letter submitted by the Supervising Architect.

Respondent's contention is that since the Budget and Accounting Act of 1921 there can be no final settlement under the Heard Act except by the Comptroller General. Such a holding is contrary to a reasonable interpretation of the decision in the Peeler case and goes beyond the decision in the Lambert case. Administrative settlements at the time of the Peeler case were subject to audit and adjustment by the regular accounting officers, just as they now are.

McKnight's Case, 13 Ct. Clms. 292 (1877);
United States v. Waters, 133 U. S. 208, 215 (1889).

If respondent's contention is sound, then this Court, when a like contention was made by the surety in the Peeler case, would have held that an auditor for the Treasury Department or the Comptroller of the Treasury was required to pass upon the recommendation of the Acting Supervising Architect, or upon the approval thereof by the Secretary of the Treasury before the six months' period started to run. This Court, however, decided the issue adversely to the contention now made by the appellee.

It is clear from the opinion in the Peeler case that this Court used the word "administrative" to show reference to executive department determination rather than settlement by officials who are now part of the General Accounting Office. Even the majority opinion of the Circuit Court of Appeals in the case at bar concedes that up to July 1, 1921, the Department of the Interior had authority to make the administrative finding, which prior to the Budget and Accounting Act of 1921 would have constituted final settlement under the Heard Act (R. 55).

A comparison of the respective Acts of Congress shows conclusively that the Budget and Accounting Act of 1921

transferred to an independent governmental agency the duties theretofore performed by six auditors in the Treasury Department and the Comptroller of the Treasury. Hence, it logically follows that since the Department of the Interior assumed the responsibility vested in it by law and found in the final settlement letter of June 16, 1927 (R. 24-28) that the United States had no claim on the bond, (*i. e.*, by determining that the United States was indebted to the contractor in the sum of $8899.30 and approving payment in that amount), final settlement took place on June 16, 1927, and an audit by the successor to the auditor of the Treasury Department was not essential to inaugurate the limitation as to time for suit prescribed by the Heard Act.

POINT D. THE FINAL SETTLEMENT LETTER OF THE DEPARTMENT OF THE INTERIOR COMPLIED WITH THE RULING OF THE COMPTROLLER GENERAL PROHIBITING THE DEPARTMENT OF THE INTERIOR FROM DECIDING QUESTIONS PERTAINING TO LIQUIDATED DAMAGES.

The work in the case at bar was delayed one hundred sixty-three days and the specifications prescribe twenty-five dollars per day as liquidated damages (R. 24).

The principal contract in the case at bar, dated June 26, 1926 (R. 17-18), is a short agreement which lacks the many uniform general provisions and requirements contained in the present standard form of Government contract. These standard forms, approved by the President on November 19, 1926, are set out in the volume on *"Government Contract Law and Administration,"* by Joseph P.

Tanney, Esq., of Washington, D. C. Standard Construction Contract form No. 23 appears on page 148 and Standard Supply Contract form No. 32 appears on page 178.

Article 5 of supply contract form No. 32 and article 9 of construction contract form No. 23 deal with liquidated damages in the event of delay, as well as the remission thereof if the delay in completion of the contract is due to unforeseen causes beyond the control and without the fault or negligence of the contractor.

Paragraph 11 of the specifications accompanying the principal contract in the case at bar contains a provision with reference to this point and to the rights of the Department of the Interior (R. 28), termed the "administrative office" by the Comptroller General (R. 30). These specifications are not on the record.

It is obvious that the Department of the Interior, when it administratively found that it had no claim under the contractor's bond in the case at bar and forwarded the papers to the office of the Comptroller General, reciting the delay in completion by the contractor, adopted the practice prevailing where the standard Government form of contract is used and there is such delay.

It has been held that, where the agreement provides for the remission of liquidated damages if the Government has suffered no damage or inconvenience on account of the delay, the official named in the contract has power to remit the same.

> "We do not mean to disturb the salutary rule relative to the power of Government officials or agents to waive or release claims or assets of the Government, nor do we do so in this case."
>
> *Pacific Hardware & Steel Co. v. United States*, 49 Court of Claims 327, 335 (1914).

It is also clear that the Secretary of the Interior, as well as the respective secretaries of the other departments, represents the President, and that they exercise the power on the subjects confided to their respective departments.

United States v. Jones, 59 U. S. 94, 95 (1855).

However, as Mr. Tanney points out:

> "The provision in this article for not charging the contractor with liquidated damages for delays due to unforeseeable causes beyond the control of the contractor arising without his fault or negligence has been the subject of a great deal of discussion between the administrative officers and the accounting officers. The administrative officers logically claiming the right to extend time for performance for such delays, or to remit damages for such delays; and the accounting officers contending that in view of the fact that when a delay occurs there is a resulting claim for damages on behalf of the Government, it is within their province to settle and adjust such claim; contending further that the province of the administrative officers is limited to a finding of facts and the extent of delay."

Tanney, *Government Contract Law,* pp. 60, 61.

The Comptroller General has rendered a formal decision, holding that the Interior Department may not waive liquidated damages for delay. This decision was given in connection with a contract which contained the standard provision that the collection of liquidated damages might be waived in whole or in part in the discretion of the Secretary of the Interior. The Comptroller General held:

> "However, it may be proper to state in this connection that where the right to deduct or collect liquidated

damages accrues to the Government under a contract, there is no jurisdiction or authority in any administrative officer of the Government to waive such right either pursuant to a provision in the contract, or otherwise, unless such jurisdiction or authority is specifically granted by statute. There is no statute authorizing the inclusion of such provision in contracts made by the Commissioner of Patents or any other officer of the Interior and such provision should be omitted from any contracts hereafter" (5 Comp. Gen. 750).

The collected opinions of the Comptroller General show that there are many cases where administrative officers have remitted damages or extended time for completion by reason of delays due to unforeseen causes beyond the control of the contractor, arising without the contractor's fault or negligence, and subsequently the Comptroller General has reversed the decision of the administrative department.

"As a result many times when administrative officers have remitted damages or extended time for such delays, the sums involved have been suspended or disallowed."

Tanney, *Government Contract Law*, p. 61.

The above explains why the Department of the Interior administratively found the facts, approved an indebtedness by the United States to the contractor in the sum of $8,899.30 and forwarded the papers to the General Accounting Office for its regular audit and the voucher for countersignature and payment (R. 24). Here, unlike the Veterans' Administration in the Lambert case, the Department of the Interior exercised its vested authority, using a final settlement letter in many respects similar in form to that used by the Treasury Department in the Peeler case.

True, the amount payable to the contractor as approved by the Department of the Interior might be increased if the liquidated damages were remitted, but such a contingency does not delay the date of final settlement under the Heard Act. The courts have frequently held that the amount determined to be due the contractor might subsequently be changed by other tribunals before whom the matter might be brought.

For illustration, see

United States to use of Stallings v. Starr, 20 Fed. (2d) 803 (C. C. A., 4th 1927),

wherein it was held:

> "There may be a final settlement between the government and the contractor, so as to fix the rights of the creditor under the statute, notwithstanding the balance may be subject to change; for, when the government has clearly indicated that it has no further claim against the surety, a final settlement within the purview of the act has taken place. U. S. v. Title Guaranty & Surety Co. (C. C. A. 7th), 254 F. 958; Robinson v. U. S. (C. C. A. 2d), 251 F. 461" (p. 807).

Hence it is clear that the authority possessed need not be such as to enable the administrative officer to take conclusive action.

CONCLUSION.

The construction of the Budget and Accounting Act of 1921 for which respondent contends is neither mandatory in view of the construction placed on substantially similar Acts of Congress, nor necessary to preserve the prior rights of the United States.

There is adequate authority to warrant a decision that, if the department having the contract in charge makes the administrative determination called final settlement, the date of such final settlement constitutes the first day of the six months during which the Heard Act gives the United States the sole right to sue.

A decision in respondent's favor in the case at bar may well be a Pyrrhic victory. The average Federal public improvement is not completed until many months after a subcontractor furnishes his labor and material. Thus, even where final settlement is made by the department having the contract in charge, subcontractors, in nearly every case, must wait a considerable period of time after they furnish their labor or material. If this Court holds that the date of final settlement under the Heard Act must be further delayed until the General Accounting Office audits the transaction, the value of the bond as an instrument to induce responsible subcontractors to bid on public work and to lower their prices, *i. e.*, the public benefit as recognized in *Equitable Surety Co. v. McMillan,* 234 U. S. 448, 456 (1914) (p. 3, of this brief), will be diminished.

Since the language repeated in the Budget and Accounting Act of 1921 does not make imperative the construction for which respondent contends, it is respectfully submitted that your Honorable Court should hold that, when the de-

partment in charge of the work states the account and, by a departmental record signed by an appropriate officer thereof, finds that the United States does not have a claim against the contractor's surety bond, final settlement as contemplated by the Heard Act has taken place. As such determinations are regularly made in the course of administration, nothing is gained by postponing the date from which to reckon the six months.

Illinois Surety Co. v. United States, to the use of Peeler, 240 U. S. 214, 218 (1916).

Respectfully submitted,

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CORRECTED COPY See each page

SUPREME COURT OF THE UNITED STATES.

No. 419.—October Term, 1933.

Globe Indemnity Company, Petitioner,
vs.
The United States of America to the use of Steacy-Schmidt Manufacturing Company, Incorporated.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 5, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent brought this suit in the District Court for Eastern Pennsylvania to recover on a bond given by petitioner, as surety, to secure the performance of a government construction contract as provided by the ~~Hurd~~ Heard Act, which requires the contractor to furnish a surety bond to the government as obligee, conditioned upon satisfactory performance of the contract and payment by the contractor for labor and material furnished by subcontractors for the construction. Act of August 13, 1894, 28 Stat. 278; as amended, Act of February 24, 1905, 33 Stat. 811, and March 3, 1911, 36 Stat. 1167; 40 U. S. C. A., § 270. In authorizing suits on the bond, the ~~Hurd~~ Heard Act provides:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and material shall . . . have a right of action . . . provided that . . . it . . . shall be commenced within one year after the performance and final settlement of the said contract and not later . . . ".

The contract was for materials for use in the construction of an irrigation project and was entered into on behalf of the United States by the Department of the Interior under the provisions of the Reclamation Act of June 17, 1902, 32 Stat. 388, 389; 43 U. S. C. A., §§ 391, 419. By letter of June 16, 1927, the First Assistant Secretary of the Department of the Interior forwarded the claim of the contractor to the General Accounting Office "for direct settlement", by a letter which stated that the contract had been com-

pletely performed and that, after deducting a stipulated amount as liquidated damage for delay in performance, the balance due was $8,889.30. The letter concluded: "The claim has received administrative examination, is approved for $8,889.30 and I recommend that the amount found due be paid" from a designated appropriation. Four months later, on October 26, 1927, the General Accounting Office issued its formal certificate of settlement confirming the balance found due by the Department of the Interior. The claim was paid by the Treasurer of the United States on November 5, 1927.

The defense to the present suit on the bond was that it had been begun October 17, 1928, more than one year after performance and final settlement of the contract. The sole question presented is whether "final settlement", within the meaning of the Heard Act, was effected by the action of the Interior Department of June 16, 1927, or only by the certificate of the General Accounting Office of October 26th. Judgment for the petitioner by the District Court was reversed by the Court of Appeals for the Third Circuit, 66 F. (2d) 302, which held that the Budget and Accounting Act of 1921, 42 Stat. 23, 31 U. S. C. A., §§ 41, et seq., had transferred the authority to make settlements of such contracts from the Department of the Interior to the General Accounting Office, that consequently final settlement did not occur until the action of the General Accounting Office upon the contractor's claim, and that the suit brought within a year was in time. Certiorari was granted, — U. S. —, to resolve an alleged conflict between this decision and that in *Consolidated Indemnity & Insurance Co.*, v. *W. A. Smoot & Co.*, 57 F. (2d), 995; compare *Lambert Lumber Co.* v. *Jones Engineering & Construction Co.*, 47 Fed. 74.

The Budget and Accounting Act set up the General Accounting Office under the direction of the Comptroller General of the United States. Section 304, 31 U. S. C. A., § 44, transferred to it the powers and duties of the Comptroller of the Treasury and of the six Auditors of the Treasury Department, and authorized the heads and disbursing officers of executive departments to apply for the decision of the General Accounting Office upon any question involving a payment to be made by them, which decision, it is declared, shall govern such office in passing upon the account. And by § 305, 31 U. S. C. A., § 71, it is provided that "all claims and demands whatever by the government of the United States or

against it . . . shall be settled and adjusted in the General Accounting Office." But none of these duties imposed on the Comptroller General were new. Like provisions applicable to the Comptroller of the Treasury or the Auditors of the Treasury Department are found in § 8 of the Act of July 31, 1894, 28 Stat. 207, and in Rev. Stat. § 236. The chief change effected by the Budget and Accounting Act was that it transferred powers lodged with officers of the Treasury Department to the Comptroller General and made his office independent of the executive branch of the government. But the function which he exercises in auditing and settling claims against the government is precisely that which was previously exercised by the Accounting Office in the Treasury Department. Before, as after the Budget and Accounting Act, claims against the United States might be paid from the proper appropriation upon approval of the authorized officer of the department concerned, without previous settlement or audit by the accounting office. Before, as after, department heads or disbursing officers might ask the accounting office to render a decision upon a question involving payment to be made by them, in order to protect the disbursing officers and their bondsmen from liability for a payment unauthorized by law.[1]

Prior to the enactment of the Budget and Accounting Act this Court had decided *Illinois Surety Co.* v. *United States, to the use of Peeler*, 240 U. S. 214. There the Treasury Department had directed that a voucher be issued for the balance which it found to be due upon a contract entered into with the Department for the construction of a public building. The Treasury Auditors apparently did not pass upon the claim before payment. The issue presented was whether suit by a sub-contractor upon a bond given under the Heard Act was premature when begun six months after the date of the Department's determination, but less than six months after payment. It was held that it was not; that the term "final settlement" in the Heard Act was not intended to denote

[1] The history, procedure and function of the Accounting Office of the Treasury before 1921 and of the General Accounting Office are discussed in detail in Smith, The General Accounting Office (Institute for Government Research, Service Monograph No. 46); Willoughby, The Legal Status and Functions of the General Accounting Office (Institute for Government Research, Studies in Administration). The settlement and adjustment of claims against the government receive particular treatment in Willoughby, c. IV.

payment, but had been used to describe an administrative determination of the amount due upon completion of the contract. Similar determinations made by other departments before the enactment of the Budget and Accounting Act have repeatedly been held to constitute final settlement within the meaning of the Heard Act. *Pederson* v. *United States for the use of Washington Iron Works*, 253 Fed. 622; *United States for use of R. Haas Electric & Mfg. Co.* v. *Title Guaranty & Surety Co.*, 254 Fed. 958; *Mandel* v. *United States for use of Wharton & N. R. Co.*, 4 F. (2d) 629; *Antrim Lumber Co.* v. *Hannan*, 18 F. (2d) 548.

In the light of this history we cannot say that Congress, merely by transferring the function previously performed by the Treasury to the General Accounting Office, intended to disturb this construction of the statute or to make final administrative determinations in the executive departments any the less final settlements within the meaning of the Heard Act than they had been before. *Consolidated Indemnity and Insurance Co.* v. *W. A. Smoot & Co.*, supra.

Respondent does not directly challenge this conclusion. It does not assert that the General Accounting Office can alone make a final settlement of a government contract, or deny that in some circumstances the authorized officer of the department concerned may make it, but it insists that where, as in this case, the claim, in advance of payment, is referred to the General Accounting Office, its decision alone is controlling and is therefore the final settlement which, under the Heard Act, fixes the period within which suit by a subcontractor may be brought.

It is true, as respondent points out, that the question thus raised is different from that involved in the earlier cases, where payment preceded audit by the accounting office, and from that in the *Peeler* case. The contract in the *Peeler* case was under the administrative control of the Treasury Department and when that case arose and was decided the power to settle contracts, now lodged with the Comptroller General, was in the Treasury Department. Thus the question presented there was not whose was the authority to make the final settlement, but at what stage the decision of the department, authorized to make it, became final. Here the question is whether the decision of the Comptroller General supplanted that of the Department of the Interior, which concededly would have

been a final settlement if there had been no action by the Comptroller General before payment. This question must be resolved in view of the purpose sought to be accomplished by the Heard Act and of the administrative procedure for the settlement, auditing and payment of claims against the government.

The Heard Act relates only to bonds given as surety for those entering into contracts for the construction of public buildings or works. It serves the dual purpose of securing to the United States the protection of a surety bond conditioned upon the performance of the contract, and of protecting those who furnish labor or material to the contractor by the further condition that the contractor shall pay for such labor and material. The statute provides that subcontractors may intervene in any suit brought on the bond of the government, but if the government does not bring suit it makes the time of completion and final settlement of the contract the crucial date for measuring the period within which subcontractors are permitted to bring suit on the bond.

The policy of the statute to afford protection to the interests of laborers and material men would not be effected unless they were allowed to bring suit with reasonable promptness after the United States has determined that it will have no claim on the bond and unless the date of final settlement which fixes the time within which suit is permitted could be ascertained with reasonable certainty and finality. A determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due, fulfills these requirements. See *Illinois Surety Co.* v. *United States to the use of Peeler, supra.* Such was the determination made here by the Interior Department, which alone was in possession of the knowledge and data necessary to prompt decision. The Department, in forwarding the claim, made every determination prerequisite to payment. See *Illinois Surety Co.* v. *United States to the use of Peeler, supra; Mandel* v. *United States, supra.* It declared that the contract had been completely performed; it stated the balance due after deducting the stipulated amount for liquidated damages for delay; it declared that the claim had received administrative examination and was approved for the balance found due; and it recorded its findings. Such a determina-

tion would be "final settlement" for purposes of the Heard Act if payment had preceded action by the Comptroller General. *Consolidated Indemnity & Insurance Co.* v. *W. A. Smoot & Co., supra.* If, as respondent maintains, this determination may be supplanted by a subsequent settlement by the Comptroller General, the subcontractors could never be certain that the departmental determination would mark the period of limitation, and suits begun within the statutory period measured from this determination might have to be discontinued and begun anew if the departmental head or disbursing officer should later refer the claim to the Comptroller General. A construction so out of harmony with administrative practice, so inconvenient in operation and so inconsistent with the obvious purpose of the statute is not to be entertained.

No such consequences either to the government or to subcontractors can result from treating the departmental settlement as the final one within the meaning of the Heard Act. There is no more occasion for delaying suit on the bond because of the contingency that the departmental determination may not be approved by the Comptroller General in his auditing of the accounts, than because of the contingency that any administrative determination may not be approved by the courts. See *Illinois Surety Co.* v. *United States to the use of Peeler, supra,* 221; *Consolidated Indemnity & Insurance Co.* v. *W. A. Smoot & Co., supra,* 997.

A different question would be presented if the department concerned declined to settle the claim and referred it to the General Accounting Office for settlement. See *Lambert Lumber Co.* v. *Jones Engineering & Construction Co., supra.*

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.